14.

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915.

No. 196.

GREAT NORTHERN RAILWAY COMPANY, PLAINTIFF IN ERROR,

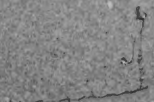
vs.

J. H. WILES, AS ADMINISTRATOR OF THE ESTATE OF DENNIS E. WILES, DECEASED.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

FILED JULY 7, 1914.

(24,301)



(24,301)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915.

No. 196.

GREAT NORTHERN RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

J. H. WILES, AS ADMINISTRATOR OF THE ESTATE OF DENNIS E. WILES, DECEASED.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JULY 27, 1915.

1 STATE OF MINNESOTA,
County of Otter Tail:

District Court, Seventh Judicial District.

J. H. WILES, as Administrator of the Estate of Dennis E. Wiles, Deceased, Plaintiff,
vs.
GREAT NORTHERN RAILWAY COMPANY, a Corporation, Defendant.

Complaint.

The complaint of the plaintiff as administrator of the estate of Dennis Wiles, deceased for cause of action against the defendant, complains and alleges:

I. That on the 8th day of October, 1910, Dennis E. Wiles, deceased, died intestate in the State of Washington. That at that time he was a citizen of the state of West Virginia and left certain property in the county of Preston and state of West Virginia and left
2 surviving him as his sole heir and next of kin J. H. Wiles the plaintiff herein, who is the father of said deceased, and who is a citizen and resident of the state of West Virginia, and that on the 17th day of January, 1911, letters of administration on the estate of the said Dennis E. Wiles were duly issued and granted to the plaintiff by the county court of Preston county, West Virginia, whereupon the plaintiff duly qualified and entered upon the duties of such administrator and that plaintiff now is the duly appointed, qualified and acting administrator of the estate of Dennis E. Wiles, deceased, and that this action is brought by plaintiff as administrator for and on his own behalf.

II. That said defendant during all the times mentioned herein owned, operated and controlled a commercial railroad and was and is a common carrier of freight and passengers for hire, and is and during all the time herein mentioned was engaged in commerce between the state of Minnesota and the state of Washington, and other states of the United States, and with a line of railroad extending between the state of Minnesota and the state of Washington and other states.

III. That on the 8th day of October, 1910, the said Dennis E. Wiles, deceased, was and for sometime prior thereto had been in the employ of the said defendant as a freight brakeman on one of its freight trains then engaged in interstate commerce. That it was the duty of said defendant to at all times furnish said Dennis E. Wiles with a safe train and safe cars and equipment and with safe and ade-
3 quate machinery, coupling appliances and coupling equipment on each and all of the cars making up the train on which said Dennis E. Wiles was required to work and perform his duties to said defendant company, and to have and to keep the said cars, machinery, coupling appliances and equipment at all

times carefully and properly inspected and to see to it at all times that the various trains of cars run and operated on and over its lines of railroad were so run and operated as not to collide with the train and cars on which said Dennis E. Wiles was required to work and perform his employment, and to run and operate its cars far enough apart so as to prevent approaching trains and cars from colliding with and causing collisions with trains and cars ahead and to enable those in charge of trains ahead to give sufficient and proper signals and warning in case of any accidents to the train or cars ahead, and it was the duty of the defendant company to see to it that approaching trains gave proper signals and warning so as to prevent collisions with trains and cars ahead.

IV. That on the 8th day of October, 1910, while the said Dennis E. Wiles, deceased, was lawfully engaged in the rightful performance of his duties as rear brakeman on one of said defendant's freight trains, which was then and there engaged in interstate commerce and was then being run and operated by the said defendant in the state of Washington, near the town of Skykomish, Washington, because of the carelessness and negligence of said defendant in

4 failing to furnish the said Dennis E. Wiles with a sufficient and adequate train and cars and engine and with sound and safe coupling appliances and equipment, and because of the carelessness and negligence of the defendant in furnishing the said Dennis E. Wiles with an unsafe train, unsafe cars and engine, and unsafe and defective coupling appliances and equipments, and while the said train was being run and operated and was about to reach the said town of Skykomish, Washington, without any fault on the part of the said Dennis E. Wiles and without any warning of any kind to him, and solely because of the carelessness and negligence of the defendant, a draw-bar in one of the coupling appliances and equipment on one of the said car or cars of said train became loose and out of repair and by reason thereof the caboose of the train on which the said Dennis E. Wiles was then and there riding in the proper discharge of his duties to the defendant became uncoupled and detached from said train and the engine pulling said train and said caboose were caused thereby to come to a standstill on the tracks of said defendant near the said town of Skykomish, Washington, and that soon thereafter and without any fault on the part of the said Dennis E. Wiles and without any warning or notice of any kind, and solely because of the carelessness and negligence of the defendant in failing to keep said cars properly and carefully inspected and because of the carelessness of defendant in failing to exercise

5 and use due care in running and operating an approaching passenger train and on account of the carelessness and negligence of the defendant in allowing and permitting said approaching passenger train to run too close in the rear of said freight train and cars, including the caboose upon which the said Dennis E. Wiles was then and there riding in the proper discharge of his duties, and because of the negligence and carelessness of the defendant in failing to give proper warning and signals of the approaching passenger train which was approaching so close in the rear of

said freight train as not to give any time whatever for the giving of notice to it of the uncoupling of said freight train, and without any fault whatever on the part of the said Dennis E. Wiles, the engine of the said approaching passenger train was caused by the defendant to carelessly and negligently collide and crash into said caboose on which the said Dennis E. Wiles was then and there riding in the proper discharge of his duties as aforesaid, with great force and violence, then and there wrecking said caboose and then and there inflicting upon the body and person of the said Dennis E. Wiles grievous and mortal wounds from which said wounds the said Dennis E. Wiles, solely on account of the negligence and carelessness of the defendant as aforesaid, the said Dennis E. Wiles died on the 8th day of October, 1910, in the state of Washington, where said accident occurred.

V. That during his life-time the said Dennis E. Wiles was a hard working, strong, robust young man and he was twenty-four
6 years of age at the time of his death, earning and capable of earning about $125 per month as a freight brakeman. That he was never married and that he was kindly disposed to said father and contributed liberally towards his father's maintenance and support, and that solely on account of the negligence and carelessness of the defendant in killing and causing the death of the said Dennis E. Wiles as aforesaid, plaintiff has been damaged by the defendant in the sum of fifty thousand dollars.

VI. Plaintiff further alleges that under and by virtue of the common law of the state of Washington and under and by virtue of the statutes of the state of Washington which were in force and effect at the time said Dennis E. Wiles was killed by the said defendant company, and ever since and now are in full force and effect, and under and by virtue of the Federal Statutes of the United States of America, which were then and ever since have been and now are in full force and effect, this plaintiff has a right of action against the defendant company, because of its carelessness and negligence in killing the said Dennis E. Wiles, and that the following are the statutes of the state of Washington and the Federal Statutes under which plaintiff has such right of action against the defendant company, to-wit:

Washington Statutes.

"Pierce's Washington Code, 1905, Sec. 256 (Ballinger's Annotated Code, Sec. 4828).

"Death in Duel or Injury by Neglect of Certain Duties, Who May Sue.

7 "The widow or widow and her children, or child or children, if no widow, of a man killed in a duel, shall have a right of action against the person killing him and against the seconds and all aiders and abettors. When the death of a person is caused by the wrongful act or neglect of another, his heirs, or personal representatives may maintain an action for damages against the person

causing the death; or when the death of a person is caused by the injury received in falling through an opening or defective place in any sidewalk, street, alley, square or wharf, his heirs, or personal representatives may maintain an action for damages against the person whose duty it was at the time of the injury to have kept in repair such sidewalk or other place. In every such action, the jury may give such damages, pecuniary or exemplary, as under all circumstances of the case, may to them seem just."

The above act as amended by the laws of Washington, 1909, Chapter 129, relating to damages for death by wrongful act.

"An act amending section 4828 of Ballinger's Annotated Codes and Statutes of Washington in relation to recovery of damages for the death of a person caused by the wrongful act or neglect of another.

"Be it enacted by the legislature of the state of Washington: Section 1. That section 4828 of Ballinger's Annotated Codes and Statutes of Washington, be and the same is hereby amended to read as follows: Section 4828. The widow or widow and
8 her children, or child or children, if no widow, of a man killed in a duel, shall have a right of action against the person killing him, and against the seconds, and all aiders and abettors. When the death of a person is caused by a wrongful act or neglect of another, his heirs or personal representatives may maintain an action for damages against the person causing the death. If the deceased leave no widow or issue, then his parents, sisters or minor brothers, who may be dependent upon him for support, and who are resident within the United States at the time of his death, may maintain said action; when the death of a person is caused by an injury received in falling through any opening or defective place, in any sidewalk, street, alley, square or wharf, his heirs, or personal representatives, or if deceased leaves no widow or issue, then his parents, sisters or minor brothers, who may be dependent upon him for support and who are resident within the United States at the time of his death may maintain an action for damages against the person whose duty it was, at the time of the injury to have kept in repair such sidewalk or other place. In every such action, the jury may give such damages as under all circumstances of the case may to them seem just.

Passed by Senate February 4th, 1909.

Passed by House March 11th, 1909.

Approved March 13th, 1909."

9 Federal Statutes.

(Act April 22nd, 1908, Chapter 149, 35 Statutes, 65.)

"That every common carrier by railroad while engaging in commerce between any of the several states or territories, or between any of the states and territories, or between the District of Columbia and

any of the states or territories, or between the District of Columbia or any of the states or territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

"SEC. 2. That every common carrier by railroad in the territories, the District of Columbia, the Panama Canal Zone or other possessions of the United States shall be liable in damages to any person suffering injury while he is employed by such carrier in any of the said jurisdictions, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, road bed, works, boats, wharves or other equipment.

"SEC. 3. That in all actions hereafter brought against any such common carrier by railroad under or by virtue of any of the provisions of this act to recover damages for personal injuries to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee: Provided, that no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation of such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee.

"SEC. 4. That in any action brought against any common carrier, under or by virtue of any of the provisions of this act to recover damages for the injuries to, or the death of, any of its employees, such employee shall not be held to have assumed the risks of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee.

"SEC. 5. That any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this act, shall to that extent be void: Provided, that in any action brought against any such common carrier under or by virtue of any of the provisions

of this act, such common carrier may set off therein any sum it ha contributed or paid to any insurance, relief benefit, or indemnity that may have been paid to the injured employee or the person en titled thereto on account of the injury or death for which said action was brought.

"SEC. 6. That no action shall be maintained under this act unless commenced within two years from the day the cause of action accrued.

"SEC. 7. That the term 'common carrier' as used in this act shall include the receiver or receivers or other persons or corporations charged with the duty and management and operation of the business of a common carrier.

"SEC. 8. That nothing in this act shall be held to limit the duty or liability of common carriers or to impair the rights of their employees under any other act or acts of congress, or to affect the prosecution of any pending proceeding or right of action under the act of congress entitled 'An act relating to liability of common carriers in the District of Columbia and territories, and to com-
12 mon carriers engaged in commerce between the state and between the states and foreign nations to their employees,' approved June eleventh, nineteen hundred and six."

(Act April 5, 1910, Chapter 143, 36 Statutes, 291).

"That an act entitled 'An act relating to the liability of common carriers by railroad to their employees in certain cases' approved April twenty-second, nineteen hundred and eight, be amended in section six so that said section shall read:

"'SEC. 6. That no action shall be maintained under this act unless commenced within two years from the day the cause of action accrued.'

"Under this act an action may be brought in a Circuit Court of the United States in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action. The jurisdiction of the courts of the United States under this act shall be concurrent with that of the courts of the several states, and no case arising under this act and brought in any state court of competent jurisdiction shall be removed to any court of the United States.

"SEC. 2. That said act be further amended by adding the following section as section nine of said act:

"SEC. 9. That any right of action given by this act to a person suffering injury shall survive to his or her personal representative, for the benefit of the surviving widow or husband and
13 children of such employee, and if none, then of such employee's parents; and if none, then of the next of kin dependent upon such employee, but in such cases there shall be only one recovery for the same injury".

Wherefor-, plaintiff demands judgment against the defendant for

the sum of fifty thousand dollars ($50,000), together with the costs and disbursements of this action.

THOS. D. SCHALL,
Attorney for Plaintiff.
554 Security Bank Bldg., Minneapolis, Minn.

J. H. WILES, as Administrator of the Estate of Dennis E. Wiles, Deceased, Plaintiff,
vs.
GREAT NORTHERN RAILWAY COMPANY, Defendant.

Answer.

I.

Defendant answering the complaint of the plaintiff in the above entitled action denies each and every allegation thereof except as is hereinafter specifically admitted or qualified.

II.

Further answering defendant alleges that it has no knowledge or information sufficient to form a belief as to the matters and things set forth in the first paragraph of the complaint herein, and hence denies the same.

III.

Defendant admits that it is a corporation and a common carrier of freight and passengers as alleged in the second paragraph of the complaint herein, and further admits that the deceased Dennis
14 E. Wiles was at the time of his death, and had been for some time prior thereto, a freight brakeman in the employ of defendant.

IV.

Further answering defendant specifically denies that by reason of any negligence or carelessness on the part of this defendant, whether as alleged in the complaint herein or otherwise, said deceased Dennis E. Wiles, suffered or sustained any injuries whatever, and alleges the fact to be that the injuries referred to in the complaint herein which resulted in the death of plaintiff's intestate were caused by his own lack of ordinary care and by his failure and neglect to obey reasonable and proper rules of this defendant which had been adopted for the performance of its work as a common carrier, which said rules were well known to plaintiff's intestate, and that such lack of ordinary care and violation of the rules of defendant contributed directly and proximately to and were in fact the cause of the injuries sustained by plaintiff's intestate and which were the cause of his death.

Wherefore defendant prays that this action be dismissed and that it recover its costs and disbursements herein.

Dated at St. Cloud, Minn., this 20th day of October, 1911.

J. D. SULLIVAN,
Attorney for Defendant, St. Cloud, Minn.

15 STATE OF MINNESOTA,
County of Stearns, ss:

J. D. Sullivan came before me personally and being first duly sworn on oath says that he is the attorney for the defendant in the above entitled action; that the foregoing answer is true of his own knowledge except as to those matters stated on information and belief and as to those matters he believes it to be true; that he makes this verification because defendant and its officers are absent from the county of Stearns, where resides this affiant, its attorney.

J. D. SULLIVAN.

Subscribed and sworn to before me this 20th day of October, 1911.

HUBERT HANSEN,
[Seal.] *Notary Public, Minnesota.*

My commission expires Jan. 1, 1915.

J. H. WILES, as Administrator of the Estate of Dennis E. Wiles, Deceased, Plaintiff,
vs.
GREAT NORTHERN RAILWAY COMPANY, Defendant.

Settled Case.

The above entitled action came on for trial at the general April, 1912, term, of the above named court, to-wit, on the 19th day of April, 1912, before the Honorable C. A. Nye, judge presiding, and a jury duly impaneled to try the same.

Messrs. Thomas D. Schall and M. J. Daly appearing as attorneys for the plaintiff, and J. D. Sullivan, Esq., appearing as attorney for the defendant.

The following is a transcript of the proceedings had and
16 testimony taken upon the trial of said cause:

Plaintiff offers in evidence Exhibit "A."

Objected to as incompetent, irrelevant and immaterial, inadmissible, and purporting to be a certificate or copy rather of an order of a court from another state, to-wit, the state of West Virginia, and not properly authenticated so as to make it admissible in evidence under the laws of the state of Minnesota; and for the further reason that it does not purport to be letters of administration authorizing J. H. Wiles to appear in this court as the representative of the deceased, Dennis E. Wiles, but simply purporting to be a certified copy of an order appointing.

Objection overruled. Exception.

Mr. SULLIVAN: I would like to add to my objection that the

instrument, Exhibit A, on its face does not purport to show that the County Court of Preston county, West Virginia, has any jurisdiction over the estate of deceased persons; and I wish to have my objection further state and show that there is nothing before the court to show what the law of West Virginia is on the question of the administration of estates; and that this Exhibit "A" does not purport to be letters of administration, but merely an order for the appointment of an administrator.

Objection overruled. Exception.

Plaintiff offers Exhibit "B" in evidence.

Received without objection.

17 Plaintiff at this time offers in evidence and reads to the jury the deposition of JOHN H. WILES, as follows:

"Interrogatories to be Propounded to John H. Wiles on Benalf of the Plaintiff.

Interrogatory No. 1. What is your name? John H. Wiles.

Interrogatory No. 2. What is your age? 53 years.

Interrogatory No. 3. Where do you reside? Rowlesburg, W. Va.

Interrogatory No. 4. What relationship, if any, existed between you and Dennis H. Wiles during his life-time? He was my son.

Interrogatory No. 5. When was Dennis E. Wiles born? He was born 23d day of February, 1885.

Interrogatory No. 6. Is the mother of Dennis E. Wiles living and if so, what is her age? She is *leaving*. Her age is 49 years.

Interrogatory No. 7. Did you know the habits and conduct of the late Dennis E. Wiles as to sobriety, thrift, and economy during his lifetime? Yes.

Interrogatory No. 8. If your answer to Interrogatory No. 7 is in the affirmative you may describe the habits and conduct of the late Dennis E. Wiles with reference to sobriety, thrift and economy or lack thereof? Good sober boy, never knew him to drink any. He was a good industrious boy, always worked good, he saved his money; he spent some to educate himself, he was never a spend-

thrift.

18 Interrogatory No. 9. Did the late Dennis E. Wiles render any aid or financial assistance to his father or mother during his life-time and if so state fully what he did in this respect? He was always ready to help. At one time especially he, during a sick spell of ten months, he being our oldest boy, was our only support, and he has helped us ever since in time of need.

Interrogatory No. 10. State, if you know, how much per month Dennis E. Wiles was earning at the time of his death. I don't know except from hearsay, but from letters received from one hundred to one hundred and twenty-five dollars."

Mr. SULLIVAN: I move that that be stricken out as incompetent, irrelevant, immaterial and hearsey.

The COURT: Motion granted.

"Interrogatory No. 12. Are you the administrator of the estate of the late Dennis E. Wiles and if so how long have you been such?"

Mr. SULLIVAN: Objected to as incompetent. I have no objection to his stating that he is the same man mentioned in this Exhibit A, but I would not want it to go on the record "are you the administrator of the estate of the late Dennis E. Wiles and if so how long have you been such."

Mr. DALY: Question renewed.

The COURT: Objection sustained as not the best evidence.

Mr. DALY: It ought to be permissible for the purpose of showing the relationship and the purpose for which he is acting.

19 Mr. SULLIVAN: I am willing to admit that he is the John H. Wiles mentioned in Exhibit A.

The COURT: With that admission the objection is sustained.

"Cross-examination of witness JOHN H. WILES by J. D. SULLIVAN, attorney for defendant:

Q. What is the nature of your own personal business?

A. Carpenter by trade.

Q. Have you any other children, besides the deceased, Dennis E. Wiles?

A. Yes, sir.

Q. How many and their ages and names?

A. We have four living and one dead. The oldest is William Wiles, age 23 years, next oldest is Ruby Wiles, about sixteen years of age, the next one is a boy, Hazel Wiles, he is about thirteen years of age; and Dwight Wiles, who is between eleven and twelve years of age.

Q. How long since your deceased son, Dennis E. Wiles, lived at home with you?

A. About seven years I think.

Q. When was the last time he sent you or his mother any money from his earnings?

A. It has been about five years to the best of my recollection.

Q. During those seven years you speak of was he working and earning for himself, I mean from when he came of age, until the time of his death?

A. Yes sir.

Q. Before this time five years ago that you speak of, tell me any other times since the deceased, Dennis E. Wiles, came of age

20 that he sent any money to yourself or his mother?

A. No, I do not know of any time he did that.

Q. This one time you speak of how much did he send?

A. Five dollars.

Q. Who did he send that to?

A. He sent it to Mrs. Wiles.

Q. This time you spoke of when you were sick that he helped, was that before he became of age?

A. Yes sir.

Q. When is the last time he visited you?

A. I think it was September, 1909.
Q. Did he leave any property or estate when he died?
A. He left fifty dollars in one bank and ten dollars in another.
Q. Was there anything else in the way of property?
A. He has six shares of stock in North American Telegraph Wireless Corporation.
Q. Has those six stock shares any value, and if so how much?
A. It says on the back of the certificate it says par value of ten dollars each, but I don't know whether it has any actual value or not."

Plaintiff offers in evidence deposition of ANNA WILES, and reads same to the jury as follows:

"Interrogatories to be propounded to Anna Wiles on Behalf of the Plaintiff.

21 Interrogatory No. 1. What is your name? Anna Wiles.
Interrogatory No. 2. What is your age? 49 years.
Interrogatory No. 3. Where do you reside? Rowlesburg, West Virginia.
Interrogatory No. 4. What relationship, if any, existed between you and Dennis E. Wiles, during his life-time? He was my son.
Interrogatory No. 5. When was Dennis E. Wiles born? Feb. 23d, 1885.
Interrogatory No. 6. Is the father of Dennis E. Wiles living, and, if so, what is his age? Yes. 53 years.
Interrogatory No. 7. Did you know the habits and conduct of the late Dennis E. Wiles as to sobriety, thrift, and economy during his life-time? Yes.
Interrogatory No. 8. If your answer to Interrogatory No. 7 is in the affirmative you may describe the habits and conduct of the late Dennis E. Wiles with reference to sobriety, thrift and economy or lack thereof? He was a good sober boy, always worked well, good conduct, he made good wages and spent a good bit of his money to educate himself.
Interrogatory No. 9. Did the late Dennis E. Wiles render any aid or financial assistance to his father or mother during his life-time and if so state fully what he did in this respect? Yes. His father was sick and during a ten month sickness of his father he
22 supported the family, and was always ready to help us in time of need, was always ready to give money to us sisters and brothers.
Interrogatory No. 10. State, if you know, how much per month Dennis E. Wiles was earning at the time of his death? Well, I read a leter——"

Mr. SULLIVAN: Same objection. Objection sustained.

"Cross examination of Anna Wiles, by J. D. SULLIVAN, attorney for defendant:

Q. Mrs. Wiles you sat here and listened to your husband's testimony, did you not?

A. Yes, sir.

Q. Are the statements of your husband as to what your son Dennis E. Wiles did in the way of contributing money either to you or to him, since your son became of age substantially correct?

A. Well it was correct, but he visited us whenever he did so he always gave me money and his brothers and sisters also.

Q. Since he came of age can you tell me what sums of money he ever gave to you or to his brothers or sisters on the occasions of those visits?

A. As much as five, and four and whatever sums I cannot just mention.

Q. Can you make it any more definite than you have?

A. I don't know.

Q. The money you say he spent on his own education, was that before he became of age or after?

A. Well a part of it was before, and a part afterwards.

23 Q. Since he came of age, did he attend any institution of learning?

A. Yes.

Q. Where, and for how long was he there?

A. Marshall and Harvey College, Huntington, W. Va., he was there I cannot tell, but think about eight weeks and took a business course.

Q. How long had your son been following railroading as an occupation?

A. About eleven months."

EXHIBIT "1."

STATE OF MINNESOTA.
County of Otter Tail:

In District Court.

J. H. WILES, as Administrator of the Estate of Dennis E. Wiles, Deceased, Plaintiff,
vs.
GREAT NORTHERN RAILWAY COMPANY, Defendant.

Deposition of C. O. Foster, Seattle, Washington.

Direct Examination.

By Mr. GREGORY:

Q. What is your full name and residence?

A. C. O. Foster, 3026 21st Ave. West, Seattle.

Q. What is your business?

A. Locomotice engineer for the Great Northern Railway Company.

Q. How long have you been locomotive engineer in their

24 business?

A. About ten years.

Q. You were in their employ during the month of October, 1910?
A. Yes, sir.
Q. Between what stations did you run during the month of Oct., 1910?
A. Seattle and Leavenworth, Washington.
Q. Do you remember the occasions of the wreck in the vicinity of Skykomish, Washington, on the morning of October 8th, 1910?
A. Yes, sir, I do.
Q. Were you on either of the trains concerned in this wreck?
A. I was on engine No. 1068 pulling train No. 44.
Q. Was that a passenger or a freight train?
A. No. 44 was a passenger train.
Q. How many engines were there pulling train No. 44?
A. Two engines.
Q. Were both engines on the same end of the train?
A. Yes, sir, both on head end of the train.
Q. Was your engine ahead or back of the other engine?
A. The head engine.
Q. What was the number *of*, you know, of the other engine on train No. 44?
A. No. 1433.
Q. Who was with you on the engine at the time of the accident?
25 A. No one was on the engine only I and fireman Montaine.
Q. Who was on the other engine?
A. Engineer Harry Geerds and his fireman, Will Harbor.
Q. What was the nature of the accident?
A. A rear end collision.
Q. Do you mean that train No. 44 collided with the rear end of another train?
A. Yes, sir.
Q. How was the other train designated or what was the number, if you know?
A. No number. Run as extra east bound freight.
Q. Who was in charge of the freight train, if you know?
A. Conductor Miller and engineer Sieg.
Q. What time of the day did the collision occur?
A. About 12:58 A. M.
Q. Between what stations did the accident occur?
A. Grotto, Washington, and Skykomish, Washington.
Q. Was train No. 44 headed towards Grotto or Skykomish at the time of the collision?
A. Towards Skykomish.
Q. How many miles were you past Grotto on your way east?
A. About two miles east of Grotto as near as I can remember.
Q. Was you train running on a regular passenger schedule?
26 A. Yes, sir.
Q. Was it on time at Grotto, Washington?
A. We past through Grotto about two minutes late.
Q. What were the weather conditions at the time of the collision?
A. It was pretty dark and a little misty.

Q. At the place of the collision is the view of the track, in any manner obstructed?

A. Yes, sir. It was obstructed by a very sharp curve and a bluff on the righthand side.

Q. Can you state, approximately, to what extent is the view of the track obstructed by the bluff or curve, I mean about how far can you see along the track?

A. I should judge about five box-car lengths.

Q. Then I understand one could not see the rear end of a freight train, at that place, if it is more than five car lengths away.

A. That is approximately correct.

Q. Is there any obstruction to the view on the left hand side of the track, at this point?

A. On the left hand side of the engine which is the fireman's side you could not see the track more than a car length ahead, because that would be on the outside of the curve.

Q. Did you know that there was a freight train ahead of your train?

A. No, sir, I did not.

Q. When did you first learn that fact?

A. When I seen the markers on the caboose.

Q. When did you first see the markers on the
27 caboose?

A. I seen the markers on the caboose about five car lengths away, I should judge.

Q. And that was the first you knew of the freight train being ahead of you?

A. That was the first.

Q. What did you do, if anything, when you saw the markers on the caboose ahead of you?

A. I applied the air and emergency brakes and closed the throttle.

Q. You mean you used the emergency brake and shut off your power. Am I right?

A. Yes, sir.

Q. Did you reverse your engine?

A. No, sir.

Q. What next did you do?

A. I grabbed for the whistle and missed it and by that time we had hit the caboose.

Q. Did you stay on the engine all this time?

A. I did. I could not get off if I wanted to.

Q. Did your fireman stay on the engine?

A. Yes, sir.

Q. What did he do, if you know?

A. I do not know what he did. I did not see him. I think he got back on the tender in the coal.

Q. At about what speed were you proceeding prior to applying the brakes and shutting off the steam?

A. I should judge about thirty miles per hour.

Q. Did you blow your whistle just prior to or at the time of the accident?

28 A. No, not at any time. I made a grab for the whistle, but being dark and not used to that engine I missed it.
Q. Was this particular engine a new one to you?
A. Yes.
Q. Had you run this particular engine No. 1068 before or was his your first trip on it?
A. I think that was my first trip on that particular engine, as I remember.
Q. Did you know Dennis E. Wiles prior to the accident we have been discussing?
A. That was the brakeman's name. I was not acquainted with him personally. I knew him by sight.
Q. Did you see him at the time of the collision or immediately afterwards, if so, state when, where and under what circumstances?
A. No, sir I did not see him at all before or immediately afterwards.
Q. Did you ever see him after the collision?
A. I seen his remains.
Q. When?
A. That same day, the 8th of October, when they took him out of the baggage car at Everett.
Q. State the condition of the body at the time you saw him?
A. The body was all wrapped up.
Q. Do you know where the body was found?
A. From my knowledge I do not know. I heard where it was found.

29 Q. Were you injured or in any manner incapacitated as the result of this accident?
A. Slightly.
Q. Were your injuries of such a nature that it would effect your memory or mental capacity?
A. No, sir.
Q. Then you were in full possession of your faculties at the time of and after the collision?
A. Yes, sir.
Q. How do you know where the body was found?
A. I do not know only what I was told by other parties.
Q. Were these parties who told you, fellow employees of the Great Northern Railway Company?
A. There was one that was, and another that was not.
Q. Was this information given you, at the time of or within a very short time after the accident?
A. It was probably four or five hours afterwards that I got this information from an outsider.
Q. And when from the other person?
A. I do not know just when, four or five days or a week after.
Q. Was the information from the outsider, as you term him, given you at the place of the accident?
A. It was near the place at Grotto.
Q. What was his name if you know?

A. I refuse to answer.

30 Q. *I refuse to answer.*

A. I do not know anything about law and do not know whether it is contempt of court or not.

Q. Do you know the name of the party who is termed an outsider?

A. Yes.

Q. What happened to your engine?

A. It tipped over and went down amongst the stumps.

Q. Was Dennis E. Wiles on your train or on the freight train?

A. He was on the freight.

Q. What particular car in the freight train did your engine strike?

A. The caboose.

Q. Is your train No. 44 a through train or is Leavenworth its terminus on the east?

A. No, sir.

Q. What is its terminus, I mean its destination?

A. The train runs from Seattle to Kansas City.

Q. How long did you stay in the vicinity of the accident?

A. Probably one hour.

Q. Where did you go then?

A. They pulled the train back to Grotto.

Q. Did you make a written report of the accident to the Great Northern Railway Company?

A. Yes, sir.

Q. Did you make a survey of conditions at the place of the accident, if so, tell us what you saw with reference to the condition of the two trains.

Q. My engine was derailed. The other engine No. 1433

31 was partially derailed and the caboose was demolished and three or four box cars loaded with shingles were demolished.

Q. Do you know the destination of the freight train?

A. No, I do not know the destination.

Q. Do you know how many cars were in the freight train, approximately?

A. No, I do not.

Q. Was there more than one engine attached to the freight train, if you know?

A. One engine, I think, is all.

Q. What is the grade going east, at the point of the collision, up or down?

A. It is up-grade going east.

Q. Did the wreck take fire?

A. Yes, sir.

Q. Do you know the extent of the fire, in other words, do you know whether any cars were consumed?

A. No, there was no car consumed, only the wreckage of the cars.

Q. After the collision and during the time you were at that point, state what you did?

A. I got out and went towards the passenger train, past the wreckage.

Q. Did you while you were at that point, go forward, that is, ward the east and examine the freight train?
A. No, sir, I did not.
Q. What is the condition of the land at the point of the collision ith reference to timber?
A. There is some timber and stumps, the large timber
2 being cut down on the right away.
Q. Is this timber of such a character as to obscure the iew of the track?
A. No, it is not.
Q. With reference to the atmospheric condition, was the mist ou have mentioned dense or light?
A. It was light.
Q. What was the last station at which you received train orders rior to the collision?
A. Everett Junction.
Q. When did you receive train orders, if any, covering this par- icular train No. 44 for that trip?
A. I received orders for this train at Everett Junction.
Q. Did they make any mention of the extra freight with which ou collided?
A. I refuse to answer.
Q. What disposition did you make or have you made of that rain order?
A. Why, I do not know what became of it.
Q. When did you have it last?
A. Well, I had it after the wreck was over.
Q. Do you know where it is now?
A. No.
Q. Was it in writing?
A. Yes.
Q. Do you remember the contents?
A. Yes.
Q. What were they?
Mr. DORETY: Do you know whether or not this train order was made in duplicate?
33 A. Yes.
Mr. DORETY: By what process are the duplicates made?
A. The operator keeps the duplicates of all orders.
Mr. DORETY: Does he make the duplicates by writing one order and copying on other paper or by carbons?
A. By carbons.
Mr. DORETY: Did you receive the original or the carbon copy?
A. The original I am supposed to receive.
Mr. DORETY: Are you able to tell which you received on that occasion?
A. I do not know.
Mr. DORETY: Under the system followed at the time how many duplicates were made by the operator?
A. I do not know. I am not supposed to know.
Mr. DORETY: Under the system of the train operation used by

the Great Northern Railway Company at that time do you know what the operator was supposed to do with any copy or copies which were not delivered to you?

A. Supposed to keep them on file.

Mr. DORETY: Did he deliver a copy to any other member of the train crew besides the engineer?

A. Yes.

Mr. DORETY: To whom was this copy delivered?

A. To the conductor, as well as the engineer.

Mr. DORETY: Is this in addition to the copy which the operator keeps on file?

34 A. Yes, sir.

Mr. DORETY: What do you mean by saying that you are supposed to receive the original?

A. The original is supposed to be delivered to the conductor and the last copy the operator is supposed to keep on file.

Mr. DORETY: Then which copy goes to the engineer?

A. Either the original or the first copy. The conductor receives the original and the first copy from the operator and delivers one of them to the engineer.

Mr. GREGORY: Are all those various copies made at the one and at the same time?

A. Yes.

Q. Which copy is the more distinct and legible?

A. Original.

Q. Which copy is the engineer to have under the system of train operation on the Great Northern Railway Company?

A. Either one which the conductor gives you.

Q. Do you know whether the train order we have been discussing and which you received governing the operation of train No. 44 was the original or not?

A. I do not know.

Q. By that am I to understand that you do not remember or that you could not distinguish between the original and the copy?

A. I could not distinguish the original from the copy.

Q. What is the original train order written with?

35 A. With some kind of a steel pencil, sometimes on a typewriter.

Q. Was the train order written with the typewriter?

A. No.

Q. Was it written with pencil or pen?

A. I do not know.

Q. Do you mean that you don't remember or that you could not distinguish?

A. I could not distinguish a pencil from a carbon or steel pen.

Q. Have you any defect of eyesight?

A. I have not.

Q. Do you know where we can locate the particular train order which you had, governing the operation of this train?

A. I do not know.

Q. What were its contents?

A. It was nothing but a slow order on a couple of bridges.

Q. Were there any other instructions contained in said order or any mention of other trains?

A. No, there was not.

Q. Are you still in the employ of the Great Northern Railway Company as engineer?

A. Yes.

Cross-examination.

By Mr. DORETY:

Q. Were you just approaching the curve in the track or were you on the curve in the track when you first saw the caboose?

36 A. On the curve.

Q. Did the track curve to the right or to your left as you were looking east?

A. To the right.

Q. What was the character of the ground to the right of t track on the outside of the curve?

A. It was obstructed by a rock or bluff.

Q. Was the slope of this bluff steep or gentle?

A. Steep.

Q. How close to the track was it?

A. I could not say exactly, probably it was eight feet from the bottom of the slope.

Q. What would have been the effect of reversing your engine so far as stopping the train is concerned, would it have stopped more quickly or less quickly?

A. It is useless to reverse an engine where you have driver brakes.

Q. Why?

A. It would cause the drivers to lock and skid and would not hold as much as with the brakes alone.

Q. Did you have driver brakes on your engine?

A. Yes.

Q. Were there driver brakes on the second engine and air brakes on the rest of the train?

A. Yes. Air brakes on both engine and train.

Q. Did you control the brakes on both engines and the entire train from your engine?

A. Yes.

Q. Did you apply all of these brakes when you saw the caboose?

37 A. Yes, sir.

Q. Was the engine which you were operating materially different from engines which you had been accustomed to operate?

A. Yes, at that time.

Q. Was there anything about this engine which you were operating which prevented you stopping the train as quickly as you might have done on the engine to which you had been accustomed?

A. No, there was nothing that hindered me stopping the train on that engine or any other engine. They were all the same at the brake valve.

Q. How close to the caboose were you, approximately, when you tried to blow the whistle?

A. Two or three car lengths.

Q. How many feet is a car length?

A. I refer to a box car which is thirty-six feet long.

Q. When you state that you remained there at the scene of the accident about an hour is that simply a guess or is it fairly accurate?

A. It was about an hour.

Q. Can you state positively that it may not have been as much as two hours, or as short as one-half hour?

A. No, I cannot swear positively.

Q. Did the mist effect you power to stop your train quickly?

A. Yes.

Q. In what way?

A. It made the rail slippery and moist.

Q. What was the class of your train?

38 A. First class.

Q. What was the class of the freight train which was run into?

A. It was an inferior class.

Q. Under the system of operation then in use were train orders furnished to the crews of first class trains showing the place or time of meeting or passing inferior trains, or the location of inferior trains?

A. No.

Redirect examination.

By Mr. GREGORY:

Q. How did you learn of the operation, meeting places, etc., of inferior trains?

A. Time card.

Q. Are extra freight trains shown on the time card?

A. No.

Q. How do you learn of passing points, etc., of extra freight trains?

A. I am not supposed to know anything about extra trains, unless I get orders to that effect.

Q. You testified in answer to Mr. Dorety's question on cross examination, that it would be useless so far as decreasing the speed of the train is concerned, for you to reverse your engine after having applied the emergency brake, is that right?

A. Yes, sir.

Q. How many tracks are there at this point?

A. One main line.

39

EXHIBIT "2."

STATE OF MINNESOTA,
County of Otter Tail:

In District Court.

J. H. WILES, as Administrator of the Estate of Dennis E. Wiles, Deceased, Plaintiff,

vs.

GREAT NORTHERN RAILWAY COMPANY, Defendant.

Deposition of A. E. Hutchinson, Everett, Washington.

Direct examination.

By Mr. GREGORY:

Q. State your name, residence and occupation?
A. A. E. Hutchinson, 2108 Summit Avenue, Everett, Washington, brakeman Great Northern Railway Company.
Q. How long have you been in the employ of the Great Northern Ry. Co.?
A. About two years and a half.
Q. And were you in the employ of the Great Northern Railway Company during the month of October, 1910?
A. 1910, yes.
Q. As brakeman?
A. Yes.
Q. Do you remember the occasion of the accident happening about the 10th of October, 1910?
A. Yes, sir.
Q. What were you doing on that day?

40

A. I was called for an extra east, No. 1900.
Q. Called for what purpose?
A. Head brakeman.
Q. To act as head brakeman?
A. Yes, sir.
Q. What was extra east 1900?
A. Freight train.
Q. Where did the accident that you referred to occur?
A. About a mile and half west of Skykomish.
Q. Between what stations?
A. Between Skykomish, Washington, and Grotto, Washington.
Q. How far from Grotto?
A. About three miles east from Grotto, I would not say just exactly three miles.
Q. What was the nature of the accident?
A. Rear end collision.
Q. Between what trains?
A. Trains No. 44 and extra east 1900.

Q. What class train was No. 44?
A. 44 was a first class train.
Q. What do you mean by a first class train?
A. A passenger train.
Q. What time of the day did the accident occur, as near as you can remember?
A. I don't just recollect just what time, about 12:51 a. m. as near as I can remember.
Q. Of what day?
A. October 10, 1910.
Q. State direction in which these trains were proceeding?
41 A. Both were proceeding east.
Q. Which was the train ahead?
A. The freight train was the train ahead.
Q What did the freight train consist of?
A. I believe we had 46 loads, an engine and a caboose.
Q. What did the passenger train consist of?
A. An engine and coaches.
Q. Do you know the number of coaches and engines attached to the passenger train?
A. Two engines on 44.
Q. Do you know the numbers of the engines attached to these various trains?
A. I believe there was a 1068 and 1433 on train 44 and 1900 on extra 1900 east.
Q. What was the point of origin and destination of extr.. freight east 1900?
A. The destination was either Skykomish or Leavenworth.
Q. What were your duties as head brakeman with reference to tonnage manifest, wheel reports, etc.?
A. No duties.
Q. Do you know the destination of any of the cars in the other train?
A. No, I do not.
Q. Did you know, prior to the accident, one Dennis E. Wiles?
A. Yes.
Q. What was the nature and extent of your acquaintance with him?
A. I knew Wiles for, I suppose about a year, he was always
42 a good friend, we roomed together in the same house, broke together, worked together.
Q. What was his business if you know?
A. He was brakeman for the Great Northern Railway Co.
Q. Was he such in October 10, 1910?
A. Yes, sir.
Q. Was he one of the members of the train crew on extra freight at the time of the accident?
A. Yes, sir.
Q. Where were you at the time the accident occured?
A. I was about, I suppose about half ways back of the train, walking towards the caboose on extra freight 1900.

Q. Where were you walking, on the train?
A. I was not walking on the train. I was walking on the ground.
Q. On which side of the train were you?
A. It would be on the right hand side going east.
Q. Were you alone?
A. Yes.
Q. What were you doing there?
A. I was going back to the caboose to get some chain.
Q. For what purpose?
A. Chain up a car with.
Q. Why?
A. A draw bar was out of the car.
Q. Do you remember the car number?
A. No, sir, I forget the car number.
Q. Was the extra freight moving?
43 A. No, sir, standing still, that is, when I was going back to the caboose.
Q. Why?
A. On account of the train breaking in two.
Q. Do you know what caused the train to break in two?
A. The draw bar pulled out.
Q. When and where did the train break in two?
A. Just about one and a half miles west of Skykomish.
Q. Was that the place of the accident?
A. At the place of the accident.
Q. What do you mean by the train breaking in two?
A. Well, the draw bar pulled out of the car, and when the draw bar pulled out of the car the train stopped.
Q. What was the distance between the two sections of the train after the break in two?
A. It was about a quarter of a carlength.
Q. Where were you at the time of this break in two?
A. I was on the engine.
Q. From your position while walking back along the track, how far could you see down the track towards the east bound train?
A. Well, I could see, I suppose, about thirty cars, or thirty-five cars.
Q. About what place in the train did the break in two occur?
A. It was about six car lengths from the engine.
Q. State the nature of the track at this point, whether it
44 is straight, or curved, or——
A. The caboose was standing right on the beginning of a straight stretch of track, I suppose for about 50 or 60 car lengths after that come a curve, then around the curve there is a straight stretch of track there, I don't know just how long that stretch of track is, quite long, though.
Q. Where is the curve you refer to with reference to the caboose?
A. About five cars west.
Q. How far could you see a train going east beyond the caboose?
A. I could see a couple of car lengths, I suppose, I could see the reflection of the head light.

Q. Was your train, extra freight east, on time at the time of the accident?

A. We have no schedule.

Q. Where did you receive train orders last prior to the accident?

A. Index, Washington.

Q. How long after your train broke in two before you were cognizant of the fact?

A. How long, just as soon as it broke in two, because it stopped the train, something was wrong.

Q. Did you get off the train immediately?

A. Yes, sir.

Q. How far did you walk before the accident occurred?

A. I ran from the engine to where the break in two was.

Q. How long did that take you?

A. I should judge ten to fifteen seconds.

45 Q. What period of time elapsed between the time that you arrived at the break in two and the collision?

A. I don't remember now just how long it was.

Q. Can you state approximately within ten or fifteen minutes how long it was?

A. I should judge from the time of the break in two, just giving a rough estimate, I suppose between three to five minutes.

Q. Did you hear the passenger train whistle?

A. No, sir.

Q. When did you first see the passenger train, about the time of the accident?

A. When it came around the curve.

Q. How far away from the freight train caboose was it when you first saw it, approximately?

A. I don't know, about a car length or two.

Q. Can you give, approximately, the rate of speed at which it was traveling?

A. No, sir.

Q. State what occurred after you first saw the passenger train?

A. It collided with the rear end, when it come around the curve it struck the rear end of 1900 east caboose, went through the caboose, and I just don't remember how many cars, three or four cars.

Q. What did you say it did to those three or four cars?

A. Smashed them up.

Q. How far were you from the caboose at the time?

A. I was about half ways back on the train, about twenty

46 cars I should judge.

Q. Were the engines or any of the cars derailed?

A. Yes, engine 1068 turned over, and 1433 was off the track, derailed, all but the tank, rear end of the tanks were still on the track.

Q. Did any of the cars or coaches leave the track, state what?

A. Extra 1900 caboose and three or four cars were smashed up, they took fire and burned, there were most all shingles I believe in the rear cars.

Q. What do you mean by saying most all shingles in the rear cars?

A. That the cars were loaded with shingles in the rear cars of the freight train.

Q. After you had gotten from the engine to the break in two in your train, what did you do there?

A. Kept on going back to the caboose to get a chain to chain it up.

Q. Did you stop at the break in two, if so, how long?

A. I just stopped long enough to see that the draw bar was out.

Q. Did you have time to reach the caboose before the collision?

A. No.

Q. What do you mean by a car length, how many feet?

A. The average about thirty-six feet.

Q. When did you see Dennis E. Wiles last prior to the collision?

A. Index, Washington.

Q. Where was he then?

47 A. He was in the caboose of extra freight east.

Q. When did you next see him.

A. That was the last time I saw him.

Q. Do you know what happened to him.

A. He was killed.

Q. Do you know whether or not he was killed in this collision?

A. No, sir.

Q. Did you see his body after the collision?

A. Yes, sir.

Q. When and where?

A. Next morning at Skykomish.

Q. Is that the first time you saw him or his remains since you left Index?

A. Yes, sir.

Q. Where was the body in Skykomish?

A. They were putting it on train No. 25 to come to Everett to the undertaker's.

Q. What was the appearance of the body at the time?

A. That is pretty hard to answer that question, the face was all burned off, that is all that I seen of him, his face and his feet sticking out of the blanket, they had him on a car door, you know, had the quilts around him.

Q. What did you do at the time of and immediately preceding the accident?

A. I could not do anything for a while, I was horrified, and when they struck us, for a few minutes, you know how a person would feel, coming like that, never expecting it, so as soon as I gathered my wits together I started back towards the rear end and about

48 that time an engineer came running upwith a torch and there was another man with him, and they told me to go up and cut our engine off, that they wanted to get to Skykomish to get fire hose, so I went up and cut the engine off and they went to Skykomish and got the fire hose and came back, I stayed up at the head end of the train to protect so that the engine would not back into it.

Q. Who was the engineer with the torch?

A. The engineer on No. 4433. That was the No. 44 engine.

Q. Do you know his name?

A. Harry Geerd.
Q. And who was with him?
A. Mr. Tegtmeir was the traveling engineer.
Q. Give the names of the train crew on your train.
A. Well, there was Jack Sieg, engineer, Elwanger was the fireman, Miller was the conductor, Wiles and myself brakemen.
Q. Did you make a written report of this accident to the Great Northern Ry. Co.?
A. Yes, sir.
Q. Did the draw bar you have referred to break or did it pull out?
A. Pulled out.
Q. What were the weather conditions at the time of the accident?
A. I don't remember just now, I believe that it was kind of misty, at least just prior to the accident if not at the time.

49 Q. How many hours after the accident did you first see the body of Dennis E. Wiles?
A. I think it was about eight or ten hours afterwards.
Q. Do you know where and under what conditions the body was found?
A. No, sir.
Q. Do you know who found the body?
A. No, sir.
Q. Up to the time of the accident do you know whether or not Dennis E. Wiles was an able bodied man?
A. Yes.
Q. Was he?
A. He was.
Q. How long after the accident did you leave the scene?
A. About, that is about three or four hours after the accident.
Q. Were you there during the time the track was cleared of the obstructions caused by the wreck?
A. No, sir.
Q. Was the caboose burning?
A. There was not much of the caboose on fire, it was more the cars on fire.
Q. What did the collision do to the caboose, was it derailed?
A. It went right through the caboose.
Q. Are you still in the employ of the Great Northern Railway Company?
A. Yes, sir.

50 Cross-examination.

By Mr. DORETY:

Q. What did the rules require with regard to protecting your train against the following passenger train?
A. The book of rules says inferior trains must clear superior trains at the time superior trains is due out of the station beyond, for ten minutes.
Q. Applying that rule to this case, what should have been done to protect extra east 1900 against No. 44?

A. The flagman should have went back to protect the rear end of his train at the time No. 44 was due out of the station in the rear.

Q. Who was the flagman whose duty it was to protect the rear end of extra 1900 east?

A. Dennis E. Wiles.

Q. That is the man who has been referred to and who was killed?

A. Yes, sir.

Q. Where did the rules require the passing of your train by No. 44?

A. We should have went into clear either at Grotto or Sykomish.

Q. How would it be determined whether or not you should leave Grotto or pull into the side track there?

A. Well if we had time to clear Grotto and make Skykomish before No. 44 was due out of Grotto we had perfect right to go to Skykomish.

Q. When you left Grotto for Skykomish on extra east 1900, the night of the accident, did you have time to make Skykomish
51 under ordinary circumstances?

A. Yes, sir.

Q. Do you know whether the engineer of your train got a signal at Grotto directing him whether to proceed to Skykomish, or pull into siding?

A. Yes.

Q. Did he get such a signal?

A. Yes.

Q. Where did it come from?

A. It came from the rear end of the train, I gave the engineer the signal.

Q. Do you know who gave you the signal?

A. No, sir.

Q. What was the signal?

A. What we call a high ball (indicating).

Q. How is a high ball given?

A. At night with a lantern and by day with the hand, similar.

Q. Who was there at the rear end to give such a signal?

A. Well, when I last seen them there was the conductor and the brakeman.

Q. The conductor and brakeman Wiles?

A. Wiles.

Q. You do not know which of them gave the signal?

A. No, sir.

Q. Up to the time of the break in your train, did it make slower progress than usual, or than you could expect?
52 A. Previous to the accident, why the train commenced to slip, the engine did.

Q. What caused that?

A. It had been misting, I suppose, a bad rail, the mist on the rail causing them to slip, they could not get the sand to work under the engine.

Q. What was the ordinary running time of such a train as this from Grotto to Skykomish?

A. I don't just remember just what was the running time there then.

Q. How far were the stations apart?

A. I believe about five miles from Grotto to Skykomish, I am not sure now, four or five.

Q. Can you state, approximately, how long it would take to run from Grotto to Skykomish?

A. A person could go from Grotto to Skykomish in twenty to twenty-five minutes.

Q. A train under ordinary conditions?

A. A train under ordinary conditions could go there in twenty to twenty five minutes.

Q. How much time had elapsed after the train left Grotto until the train broke in two?

A. I don't remember just how long it was.

Q. Can you state approximately?

A. I suppose it would be about twenty to twenty five minutes.

Q. Under ordinary circumstances should your train have been on the side track at Skykomish at the time when it broke in two?

A. Yes it should have been in the clearing of the main line, it should have been on the clearing of the main line at Skykomish or Grotto.

53 Q. Where a train has failed to make the clearing before schedule time of arrival of a superior train, at the station last past, what protection was required by the rules?

A. The flagman should go to the back and protect the rear end of his train.

Q. Does the rule apply whether the delayed inferior train which is ahead is running or standing still?

A. It does not make any difference?

Q. It applies in either case?

A. In either case.

Q. What member of the train crew acts as flagman under such circumstances?

A. Under the circumstances, if the train is behind us, the rear brakeman protects as flagman.

Q. Then do I understand you that under the rules and conditions which existed at the time of the accident, the rear brakeman, Dennis E. Wiles, should have been out protecting his train?

A. Yes, sir.

Q. Where should he have been?

A. A sufficient distance to guarantee full protection to the rear of his train.

Q. That means on the track at some distance to the rear of the train?

A. Yes, far enough back.

Q. Do you know what caused the draw bar to pull out?

A. I do not.

Q. Had the engine-r on your engine given any signals to
54 the rear brakeman at or just before the time of the accident?

A. Yes, he whistled to the flagman to go back and protect the rear end of his train.

Q. When had this signal been given?
A. Just at the time we broke in two.
Q. Do you know whether or not Wiles had been drinking that night?
A. No sir, I do not, but I don't think he had.

Redirect examination.

By Mr. GREGORY:

Q. What was the signal given by the engineer to the rear brakeman to which you referred?
A. What was the signal?
Q. Yes?
A. It was a long blast and three short blasts of the whistle.
Q. What period of time elapsed between the time he whistled and the collision?
A. I don't remember. I think it was about three to five minutes.
Q. You may be mistaken as to the time, it might have been less than three minutes or more?
A. I am sure it was between three and five minutes.
Q. Did it take you from three to five minutes to go from the engine to the point where you stood when the collision occurred?
A. Yes.
Q. Did you know and was it your duty to know that 44 was following your train?
A. Yes, I knew it, as an experienced brakeman I was
55 supposed to know that No. 44 was following.
Q. Did you know whether or not train No. 44 was on time on the night of the accident?
A. I did not.
Q. Was it your duty to know?
A. My duty to know whether 44 was on time or not?
Q. Yes.
A. Yes.
Q. How many tracks are there at the scene of the accident?
A. One.
Q. The rules of the Great Northern Ry. Co. covering train operation and which you referred to in answer to questions put to you on cross examination, are printed in book form, are they not?
A. Yes, sir.
Q. And your knowledge of the rules has been gained from printed copies you say?
A. It has been gained practically and theoretically.
Q. What do you mean by the theoretical knowledge you have gained of the Great Northern rules?
A. That is the book of rules.
Q. Do you mean the printed book of rules?
A. Yes, the printed form.

Recross-examination.

By Mr. DORETY:

Q. What do you mean by your practical knowledge of these rules?

A. That is the knowledge I learned working on the road,
56 lots of things a man can learn working on the road, practical.

Q. Do you have instructions on the road aside from the book of rules?

A. Yes, sir.

Q. Do you have any other instructions outside of what you get when you are out working on the road, and what you get from the book of rules?

A. When a man hires out as an experienced brakeman they examine him in flagging, and how to protect a train, different ways of protecting.

Q. Do I understand you that your testimony regarding the rules and methods of operation is based on the knowledge that you have gained in all three of these ways?

A. Yes.

Q. How would you know as brakeman on extra 1900 whether 44 was on time or not?

A. They are always on time unless we get orders otherwise.

Q. It is your duty then to assume that they are on time?

A. Yes, always on time.

57 EXHIBIT "3."

STATE OF MINNESOTA,
County of Otter Tail:

In District Court.

J. H. WILES, as Administrator of the Estate of Dennis E. Wiles, Deceased, Plaintiff,

vs.

GREAT NORTHERN RAILWAY COMPANY, Defendant.

Deposition of W. H. Brokaw, Everett, Washington.

Direct examination.

By Mr. GREGORY:

Q. What is your name and residence?

A. W. H. Brokaw, Everett, Washington.

Q. What is your occupation?

A. Train master for the Great Northern Railway Company.

Q. What division?

A. Cascade division.

Q. What does the Cascade division include? What portion of the line?

A. All lines west of Leavenworth, Washington.

Q. Is that portion of the Great Northern between Everett, Washington and Skykomish, Washington, included in your jurisdiction?

A. Yes.

Q. Do you remember the occasion of an accident or wreck occurring in the vicinity of Skykomish, Washington, on the 8th of October, 1910?

A. Yes, sir, I do.

58 Q. Were you train master, Cascade division, at that time?

A. I was.

Q. Where were you at the time of the wreck?

A. At Skykomish, Washington.

Q. How far was that from the point where the accident occurred?

A. About a mile.

Q. Were you in Skykomish in your official capacity as train master of the Cascade division?

A. I was.

Q. How soon after the accident did you arrive at the scene?

A. I could not tell you the exact time of the collision or the exact time I reached the scene, but I was at the scene of the accident within five minutes after I knew of the accident, probably ten minutes after the accident.

Q. Did you know Dennis E. Wiles?

A. I knew him, yes, sir.

Q. What was his occupation?

A. He was a brakeman.

Q. On the date of the accident where was he working?

A. He was working on extra No. 1900 east bound as a rear brakeman.

Q. What class or character was No. 1900 extra east?

A. Third class train and a freight train.

Q. When did you last see Dennis E. Wiles prior to the accident, if you remember?

A. I saw him at Monroe, Washington, in the evening

59 about 6:50 p. m.

Q. Can you state approximately how many hours that was prior to the accident?

A. Probably five hours.

Q. What was he doing at Monroe?

A. Brakeman on extra No. 1900.

Q. Where was he?

A. He was on the ground looking his train over.

Q. When did you next see him?

A. I saw a piece of his arm protruding from the dirt at about 10:00 p. m. the next day.

Q. Where was that?

A. The place of the accident about a mile west of Skykomish.

Q. Describe the location of the place as nearly as you can where you saw the arm, particularly with reference to the distance from the track, engines, etc.

A. About thirty feet from the track directly into and partly under

the front end of the engine, and the engine crowded right along with him into the dirt. It toppled over.

Q. On which side, the right side or the left side of the track, was the body when you were facing east?

A. On the left hand side.

Q. Did you in your official capacity superintend the clearing up of the track and the removal of the debris?

A. I did.

Q. Do you know who first discovered the body of Dennis E. Wiles?

60 A. Yes, sir.

Q. Who did?

A. The fireman on the engine first told me he thought he saw something like a man's arm under the front end of the rail. I investigated and uncovered a portion of the arm.

Q. Who was with you?

A. The entire wrecking outfit, section men and laborers. I had a bunch of laborers dig this body out and wrap it up.

Q. Can you give the names of some of those persons?

A. I decline to answer.

—. —.

A. I do not remember the names of any of those present. I know the fireman was there and I know the engineer was there, I do not remember who was running the engine.

Q. Do you remember the names of the engineer and the fireman who were present at the time?

A. I remember the name of the engineer who was at the collision, but I do not know the name of the engineer who was handling either of the working trains.

Q. State what you did or what you saw done after you discovered the protruding arm with reference to the removal of the body or its disposition?

A. I instructed the foreman of the gang of laborers to have his men dig the body out, secure a blanket and have the body brought out on a stretcher and wrap it in the canvass and blanket and had it forwarded to Everett.

Q. What was the foreman's name?

61 A. I do not remember.

Q. Is he at present in the employ of your company?

A. I do not know.

Q. What was the condition of the body?

A. I did not examine it closely.

Q. What was the conditions of the body from what you saw?

A. The body was covered with dirt, ashes and had become mangled from the bad position in which the body laid.

Q. Under what portion of the engine was the body found?

A. It was partly in the smoke box and partly under it.

Q. Which engine do you refer to?

A. The leading engine on train 44, I do not remember the number.

Q. Do you know whether or not there was anything clasped in the hands of the dead body when discovered?
A. No, I do not know of anything.
Q. Was the body clothed, if so, what extent, how?
A. Very little clothing on him. It looked as though his clothing had been partly burned and torn off.
Q. From your view of the remains state whether or not at the time of meeting death Dennis E. Wiles was full clothed or not?
A. I could not say.
Q. Was the body clothed in coat and trousers?
62 A. I don't know whether he was full dressed or whether he was not.
Q. What were the average earnings of Dennis E. Wiles prior to the accident with your company?
A. I should say it was about $90.00 per month.
Q. What was the point of origin of extra east bound No. 1900?
A. Delta, Washington.
Q. What was its destination?
A. Leavenworth, Washington.
Q. What did extra No. 1900 consist of?
A. Freight cars and engine. I do not remember the exact number of cars that there were on the train.
Q. Do you know the nature of the loads of any of the cars included in this train?
A. Lumber and shingles.
Q. Do you know the destination of any of the shipments?
A. I do not.
Q. Was extra No. 1900, what is known in railroad circles as a through train?
A. Yes.
Q. What *you* you mean by a through freight train?
A. A train that does not do local work.
Q. Was Leavenworth, Washington, the final point of destination of the shipments contained in this train?
A. I do not think so.
Q. What was the destination?
63 A. I do not know the destination of any of the cars in the train except the caboose.
Q. Do you know whether or not any of the shipments contained in extra No. 1900 were destined for points outside of the state of Washington?
A. I do not.
Q. Do you know the name of the conductor on extra east No. 1900?
A. Conductor Miller.
Q. Do you know whether or not he was injured in this accident?
A. He died of the injuries received in this accident.
Q. What was the nature of the accident?
A. Rear end collision.
Q. Between what trains?
A. Train No. 44 and extra east No. 1900.

Q. What class train is No. 44?
A. First class.
Q. Is it a passenger or freight?
A. Passenger train.
Q. Which was the forward train in this collision?
A. Extra No. 1900.
Q. Between what stations did the collision occur?
A. Between Grotto and Skykomish.
Q. What portion of the freight train did the passenger train collide with?
A. The rear portion of the train.
Q. What cars?
A. The rear car of the train.
Q. What do you designate as the rear car?
A. Any car that happened to be on the rear end of the train.
Q. Was the rear car of the freight train a freight car, box car, or what kind of a car was it?
A. The rear car was the caboose.
Q. Do you know at what point the train crews of these two trains were to receive train orders last prior to the accident?
A. I do not. I know the last point they could have received but I do not know where they did receive orders.
Q. How many engines were there on the passenger train?
A. Two.
Q. And how many on the freight train?
A. One.
Q. Do you know the number of loads and empties carried by the freight train?
A. No, I do not.
Q. Are you familiar with the topography of the land at the point of the accident?
A. Yes, sir.
Q. What is the physical condition at that point?
A. The track is about level with an up grade. At the point of the accident a descending grade on the right hand curve.
Q. Where was the accident with reference to this curve?
A. It was near the east end of the curve.
Q. Did the accident occur on the curve?
A. Yes.
Q. How far can one see from the place occupied by the caboose of the freight train back over the track looking west?
A. About 400 feet.
Q. How is the view obstructed beyond that point?
A. By a hill.
Q. What were the weather conditions at the time of the accident?
A. Dark and cloudy, possibly rainy little.
Q. Did you make a report of the accident to the Great Northern Railway Company immediately following?
A. I made a report of it before the body of Wiles was found.

Q. Did the wreck take fire?
A. Yes.
Q. How many cars were demolished?
A. I think there was four cars demolished and the caboose?
Q. Do you know whether or not passenger train No. 44 was on time at the time of the accident?
A. No, sir, I don't.
Q. What is the point of origin and destination of passenger train No. 44?
A. Originated at Seattle, destination Kansas City, Missouri.
Q. Were any other officers of the Great Northern Railway Company with you at the time and place of the wreck?
A. No.

66 Q. State the position of the engine under which the body of Dennis E. Wiles was found with reference to its distance from the place occupied by the caboose.

A. I don't know where the caboose was when it struck it, and Wiles was not found under the engine but partly under it and partly in. The engine was turned partly over.
Q. With reference to extra freight No. 1900 state whether there was any other evidence of an accident outside of the collision?
A. No evidence of anything outside of the collision.
Q. Did you notice any brake in two in extra freight No. 1900?
A. The train was broken in three or four places.
Q. Did you notice any draw bars pulled out of any of the freight cars?
A. Yes, there was draw bars drawed in and pulled out.
Q. How many draw bars did you notice as having been pulled out?
A. I don't remember but one that was pulled out.
Q. What part of the train?
A. Near the head end and eight or ten cars back of engine No. 1900.
Q. Did you personally examine that particular break in two?
A. I did not give any minute examination. It was not pulled entirely out, but hanging in place.

67 Q. Was it pulled out to an extent that would cause a break?
A. Yes.

Q. Do you know what caused the draw bar to pull out?
A. No.
Q. In your opinion, what was the reason for its pulling out?
A. The collision.
Q. Do you know whether or not Dennis E. Willes was killed as a result of the rear end collision?
A. No, sir, I did not. I did not know he was dead until when we took him out.
Q. Are you still in the employ of the Great Northern Railway Company?
A. Yes, sir.
Q. How many tracks were there at the scene of the accident?
A. One track.

Q. Were any other loads in extra freight No. 1900 besides those consisting of lumber and shingles?

A. I could not say.

Cross-examination.

By Mr. DORETY: I have no questions to ask.

68 EXHIBIT "4."

STATE OF MINNESOTA.
County of Otter Tail:

In District Court.

J. H. WILES, as Administrator of the Estate of Dennis E. Wiles, Deceased, Plaintiff,
vs.
GREAT NORTHERN RAILWAY COMPANY, Defendant.

Deposition of J. H. O'Neill, Everett, Washington.

Direct examination.

By Mr. GREGORY:

Q. What is your name, business and residence?

A. J. H. O'Neill; superintendent for the Great Northern Railway Company, Cascade Division; Everett, Washington.

Q. Does the Cascade Division include that portion of the Great Northern Railway Company between Everett and Leavenworth, Washington?

A. Yes.

Q. How long have you been superintendent of this division?

A. Five years.

Q. Do you remember the occasion of an accident happening on your division about the 8th of October, 1910, between stations of Grotto and Skykomish, Washington?

A. I remember an accident happening up there, but I do not remember the date.

Q. What was the nature of the accident that you have in
69 mind?

A. Passenger train No. 44 collided with the rear end of a freight train eastbound.

Q. Do you remember the number of the freight train?

A. No, sir, I do not.

Q. Do you know whether it was a regular freight or not?

A. No, sir, I think it was an extra.

Q. Do you remember the month and year when the accident you mentioned occurred?

A. I cannot just recall that. It was along in the fall last year.

Q. That would be the fall of 1911.

—. —.

Q. Do you remember the names of any of the members of the train crew of the trains involved in this collision?

A. Yes. Engineer Foster was one of the engineers of No. 44 and Engineer Sieg was engineer of the freight train.

Q. Do you remember the names of any other members of the train crew of the trains involved?

A. No, I think Conductor Miller was conductor on the freight train. I do not recall the balance of the crew now.

Q. Do you know whether one Dennis E. Wiles was a member of the train crew of either train?

A. Yes, sir, I believe Wiles was rear brakeman on the freight train.

Q. What happened to Wiles in this accident?

A. He was killed.

70 Q. Do you know where the extra freight train was made up? What was the point of origin and what was its destination?

A. Made up at Everett and the destination of the train crew was at Leavenworth.

Q. Is Leavenworth the extreme terminus of your division?

A. Yes.

Q. Do you know whether any of the loads of the freight train were destined beyond Leavenworth?

A. No, I would not say.

Q. Do you know what any of the loads of the freight train consisted of?

A. No, I do not know that.

Q. Do the records of your office as division superintendent show the destination of any of the loads in this freight train?

A. No, I do not believe we have any records of the loads in that train.

Q. What was the character of this freight train? Was it what is known in railroad circles as a through or local train?

A. No, I think it was classed as a through train?

Q. What is the difference between a through and a local train?

A. A local freight is a freight that unloads and reloads package freight and picks up and sets out loads and does switching at the different stations. A through freight train is a freight — made up at a point, for example, Everett, and goes through to Leavenworth without any switching.

71 Q. What happens to a through freight when it reaches Leavenworth?

A. I do not know. I presume some of it moves as local freight and some as through freight.

Q. What do you mean by some of it moves as local freight and some as through freight?

A. Some of the train may be broken up, put into a train that does local work, the balance may go through as a through train.

Q. Through to where?

A. The destination of the billing.

Q. Are shipments for points outside of the state of Washington

handled by the Great Northern Railway Company on your division in what are known as local freight trains?

A. Yes, sir.

Q. Are local shipments for points within the state of Washington handled on through trains on your division?

A. Sometimes on through and sometimes on local. Depends on the amount of tonnage involved.

Q. What determines the question as to whether loads shall go into a local freight or through freight?

A. A local train picking up loads may be destined for points in the state of Washington. A through train may be destined for points east.

Q. Do you know the nature or character of any of the shipments unloaded in this extra freight train?

A. No, sir. No more than that I know that two or three cars of shingles were the cars that took fire.

72 Q. Was there any lumber that you know of?

A. I could not say as to that for sure.

Q. Do you know where any of those loads of shingles were consigned?

A. No, sir, I do not.

Q. Or do you know the names of the consignors of any of those loads?

A. No, sir, I do not know.

Q. Were you personally acquainted with Dennis E. Wiles?

A. No, sir, I cannot say that I was.

Q. Do you know what his average earning capacity was at the time of his death as a brakeman on your division?

A. No, sir, I do not.

Q. Were you present at the scene of the accident?

A. Yes, about six hours after it happened.

Q. State as nearly as you can the exact conditions at the point of the wreck?

A. It was an obscure point. A train approaching from the west, eastbound, could not be seen from the rear of the freight train more than approximately 300 feet.

Q. Give the exact location, as nearly as you can, of the wreck.

A. Between Grotto and Skykomish about a mile and a half to two miles west of Skykomish.

Q. Did you assist or superintend the clearing of the track of wreckage?

A. Yes.

73 Q. When did you last see Dennis E. Wiles prior to the wreck, if you remember?

A. I cannot say when I did see him previous to the accident.

Q. When did you see him or when or where did you see him or his body immediately after the accident?

A. I did not see it. The body was found when the line was made clear.

Q. Do you know where it was found?

A. No, sir, I was not present when the body was recovered.

Q. Do you know the condition of the body?
A. No, sir, I do not.
Q. Do you remember the weather conditions at the time of the accident?
A. No, sir, I do not recall.
Q. Where were you at the time of the accident?
A. I was at Tye, Washington.
Q. How far is that from the place of the accident?
A. About thrity-five miles.
Q. Did you as superintendent make an investigation of the causes leading up to this accident?
A. Yes, sir, I did.
Q. Do you know whether or not passenger train No. 44 was on time at the time of the accident?
A. As I remember the engineer told me that they were five minutes late passing Grotto station.
Q. Have you any other knowledge outside of what was told you by the engineer as to whether or not passenger train No. 44
74 was on time at the time of the accident?
A. No, not any more than our train sheet shows.
Q. What does the train sheet show?
A. At this time I do not recall just what the records show.
Q. Do you remember whether the train sheet shows whether the train is late or on time?
A. On time.
Q. Do you mean it showed it on time at Grotto?
A. It showed it about on time at the last telegraph station, Index, Washington.
Q. Did you investigate the contents of the different freight cars constituting the freight train immediately after the accident?
A. No, sir.
Q. Do you know whether or not the extra freight train showed evidences of any other defects or of any other accident having happened to it besides the collision?
A. The investigation of the matter showed that it was broke in two.
Q. Was the break in two prior to the collision?
A. Yes.
Q. At what point in the train did the break occur?
A. I do not remember just where it did occur.
Q. Do you know the cause or the nature of the break in two?
A. No, sir.
Q. Describe the condition of the rolling stock with reference to its position when you saw it.
75 A. The caboose and three or four other freight cars derailed and tipped over and also the leading engine on train No. 44 and the forward part of the second engine on No. 44.
Q. Do you know who superintended the work of removing the body of Dennis E. Wiles from the debris?
A. No, sir, I do not.
Q. Did that work come under your jurisdiction?

A. No, sir.

Q. What was the number of brakemen employed on the freight train?

A. Two.

Q. Do you remember the name of the other brakeman?

A. No, sir, I do not.

Q. Do you know what occurred to the conductor of the freight train in this accident?

A. He was killed, also.

Q. What class train is No. 44 train?

A. First class.

Q. What class was the freight train?

A. Third class.

Q. Was the running time of both of those trains shown on your printed time schedules or time card?

A. No, sir, the passenger train is the only scheduled train in this case.

Q. Do you know whether or not the wreck took fire?

A. Yes, sir, it did take fire.

76 Q. What was the extent of the fire?

A. Burnt up portion of the caboose and a portion of the cars of shingles.

Cross-examination.

By Mr. DORETY:

Q. How do you know that Brakeman Wiles was killed in the collision?

A. I do not know any more than what was claimed.

Q. How do you know that the conductor was killed?

A. Same.

Q. Have you any knowledge that either of these men were killed in the collision other than what you have derived from other people?

A. I have no other knowledge than from the reports received in connection with the accident.

Mr. DORETY: I will move to strike the former answers to the effect that the brakeman and conductor were killed in the collision on the grounds that the answers are shown to be hearsay or that they purport to give the contents of a written instrument which are not accounted for.

Redirect examination:

Q. Were the reports of and concerning this accident received by you in your official capacity as superintendent of the Cascade Division of the Great Northern Railway Company?

A. Yes, sir.

Q. Before that what did he work at?

77 A. He was clerking in the Blackwater Hotel at Davis, W. Va.

Mr. DALY: We have a number of depositions here of the men who worked upon this train with the deceased, and I rather think some of them are present here. I do not know just what the rule is as to whether we have a right to read those depositions if the witnesses are here, but I do not know whether they are here or not.

Mr. SULLIVAN: I will waive anything of that kind. I just want to see the certificates.

Plaintiff at this time offers in evidence and reads to the jury the depositions of C. O. Foster, A. E. Hutchinson, W. H. Brokaw, and J. H. O'Neil, which depositions are included herein, marked, respectvely, Exhibits "1," "2," "3" and "4."

Plaintiff rests.

Defendant asks permission to rest for the purpose of making motion to direct a verdict, and asks for permission to discuss the question outside of the presence of the jury.

The COURT: Request to rest case for the purpose of the motion granted.

Defendant rests.

Defendant, by permission of the court, having rested its case for the purpose of moving for a directed verdict in its favor, hereby moves the court at this time that the jury be instructed to find a verdict in favor of the defendant.

Motion denied. Exception.

78 On motion of the defendant the case is reopened and the following evidence introduced:

WILLIAM HOWARD BROKAW, called as a witness on the part of the defendant and being first duly sworn, testified as follows:

Q. Where do you live?

A. Everett, Washington.

Q. What is your business?

A. I am trainmaster for the Great Northern.

Q. What division?

A. Cascade.

Q. That Cascade Division comprises from what point to what point?

A. It comprises from Leavenworth, Washington, to Portland, Oregon, and from Seattle to Vancouver, B. C., and all its branches.

Q. Did you know the deceased, Dennis Wiles, about the circumstances of whose death we have been talking here?

A. I did.

Q. What position did he occupy with the Great Northern at the time of his death?

A. Rear brakeman for Conductor Miller on a freight train.

Q. Are you the Mr. Brokaw who was present at the wreck at the time the body of Wiles was removed?

A. I am.

Q. Where was his body found with reference to the outfit?

A. The engine was tipped over on the side; the front por-
79 tion of the engine, the smoke box of the engine, was caved in from the contact of the rear end of the train; it was evidently caught wild, and he was found right around this front end, being a curve around like that, and this front end being caved in, he was caught around this edge—twisted around—and plowed into the dirt along with the engine.

Q. Was there any portions of the caboose found at the point where Wiles' body was taken up?

A. Yes, sir; there was portions of the caboose there; there was tools that came out of the lockers, frogs, pieces of chains, knuckles, pins.

Q. Do you mean such appliances as are ordinarily found in cabooses?

A. Yes, sir.

Q. Now, Mr. Brokaw, do you know the engineer of the head engine of that passenger train that collided with that caboose of that freight?

A. Yes, sir.

Q. What was his name?

A. Charley Foster.

Q. You heard the reading of those depositions, did you?

A. I did.

Q. Do you know what that train was that was being pulled by Engineer Foster?

A. Yes, sir.

Q. What kind of a train was that?

A. That was a passenger train.

Q. Was that train being operated on a schedule?

A. Yes, sir.

80 Q. What kind of a freight was this freight that Wiles was the rear brakeman on?

A. That was an extra freight train.

Q. What was Wiles' duty as the rear brakeman of that train under the circumstances that those trains were being operated there that night?

Objected to as calling for a conclusion of the witness; no evidence that he knows under what circumstances those trains were being operated. I think he should simply state what his duties were as brakeman.

(By Mr. DALY:)

Q. Did you say you were trainmaster?

A. Yes, sir.

Q. Do you know and did you know of your own personal knowledge the circumstances attending the operation of those trains that night?

A. No, I did not know of my personal knowledge, no, sir. I did know a portion of it. I came out of Everett on that train as far as

Monroe, some fifteen miles; I know how they started out and what their orders were.

Q. Which train?

A. The freight train.

Q. That extra freight?

A. Yes, sir.

Q. You knew personally it was an extra freight, did you?

A. Yes, sir.

Q. Did you know personally that No. 44 was a passenger train?

A. Yes, sir.

81 Q. Regular train?

A. Yes, sir.

Q. Operating on a regular schedule?

A. Regular train, daily.

Q. Wiles as the rear brakeman of that freight train, what was his duty in regard to knowing the time of the passenger train?

A. His duty was to know when they were due to leave all stations or any station. He had a time table to show him when they was due. He was compelled by the rules of the company also to have a watch.

Q. Mr. Brokaw, in the absence of any order to the contrary, what did Wiles as the rear brakeman necessarily know in regard to the time of the passenger?

A. He knew just as much as anybody else on the train.

Q. The presumption was it was on time, was it?

A. It was on time, yes, sir.

Q. Now, assuming that this extra freight left Grotto station under the circumstances detailed here—you heard those depositions read?

A. Yes, sir.

Q. To go to Skykomish, and assuming that Wiles knew the schedule time of the passenger, what was his duty there in regard to flagging or giving signals for the benefit of the approaching passenger trains, Mr. Brokaw?

Mr. DALY: I would like to inquire whether those duties

82 are found in the rules of the company, in the printed rules, and if they are, I insist that the printed rules are the best evidence.

Mr. SULLIVAN: I presume they are in the rules, but we are not confined to the rules if this man knows as train master of the division what the duties of this man were.

Objection overruled.

Q. What were his duties under the circumstances?

A. He should have dropped off of that freight train before this wreck occurred for the simple fact of the engine slipping; they were losing the time that they figured they should make, and the passenger was due to leave Grotto station. Immediately when that train was due to leave Grotto he should have dropped off or dropped fusees on the track to notify him that they were running slow.

Q. Do you know whether Wiles as brakeman was provided with fusees?

A. It was when I got off the train at Monroe.

Q. And you got off how far back?

A. That was about thirty-five miles west of where the accident occurred.

Q. Is it usual and customary that cabooses, all of them, are provided with appliances of that character, fusees and such as that?

A. They are compelled to have them.

Q. Now, then, as I understand the situation, you claim that it was his duty as rear brakeman to either drop off when they found they were getting behind or onto the passenger's time, or else put out those fusees?

83 A. Yes, sir.

Q. What are those fusees? Explain to the jury. Perhaps some of those gentlemen do not understand.

A. It is something like a Roman candle, one heavy end with a barb on it; burn- ten minutes; drop it off and it sticks in the track and makes a big red light for ten minutes.

Q. What does that signify to a trainman approaching and seeing of those fusees

A. If it is a red fusee he is compelled to stop until that burns out.

Q. Are there other fusees?

A. Yellow fusee.

Q. What does that mean?

A. Bring your train under control and keep under control until you get to the next station.

Q. Those are the only kinds of fusees and signify those two things?

A. Yes, sir, shows that there is a train running ahead of you slow.

Q. Assuming that the evidence shows here that this train broke in two what was the duty of Wiles the brakeman as soon as that broke in two?

A. He should have immediately hurried back with his red light and his white light, torpedoes and fusees.

Q. Where to?

A. Just far enough to insure full protection of that train.

Q. Assuming that he had from three to five minutes to do that is about how far back in your judgment, should that brake-

84 man Wiles have been after the train broke in two and before the collision?

A. Well, he should have been back at least six or eight hundred feet; possibly a thousand.

Q. That is if he had hurried back?

A. Yes, sir.

Q. Was it necessary that he should receive any order to go back by the conductor, or was it his duty to do it himself without any orders?

A. It was his duty absolutely to do that without any instruction from anybody. His rules shows him that. His rules shows him exactly what he should do in cases of that kind.

By Mr. DALY: Have you got those rules?
A. He has got one; I have not got mine.
Q. Will you look at this book, Mr. Brokaw. What is that book?
A. That is the transportation rules of the Great Northern.
Q. I will ask you to turn to the rule, if you can find it in that book, referring to the duties of this brakeman Wiles under the circumstances shown in this case after the train broke in two?
A. Rule ninety-nine.
Q. That rule ninety-nine found on page thirty-eight of this book of rules,, was that the rule in force and effect at the time this collision occurred?
A. That is the rule, yes, sir.

Mr. SULLIVAN: I desire, if the court please, to offer and to read this rule into the record, as follows:

"Rule number ninety-nine. When a train stops or is de-
85 layed by any circumstance under which it may be overtaken by another train, the flagman must go back immediately with stop signals a sufficient distance to insure full protection. When recalled he may return to his train, first placing two torpedoes on the rail six rail lengths apart, or a lighted fusee in the center of the track when conditions require."

Q. Is this rule 100 also applicable to this parting of trains?
A. Yes, sir.

Mr. SULLIVAN: I desire to read this rule also if the court please.

"Rule 100. If the train should part while in motion train men must, if possible, prevent damage to the detached portions. The signals prescribed by 13D and 15F must be given."

Q. What is this 13D that is referred to?
A. 13D I think is the whistle signals.
Q. Look at it and see?
A. That is the lantern signal or the hand signal, either one.
Q. And 15F referred to there, what is that?
A. That is the whistle signal.
Q. That rule 100, as I understand, applies to what shall be done by the members of the train crew for the protection of the severed portions of the train itself?
A. Yes, sir.
Q. Rule number ninety-nine is what applies for the protection of other trains approaching?
A. Yes, sir.

86 Cross-examination:

Q. How many men were working on this extra freight train that night?
A. Conductor and two brakemen, an engineer and a fireman.
Q. Conductor, two brakemen, engineer and fireman?
A. Yes, sir.
Q. Were the brakeman Hutchinson and Wiles?
A. Yes, sir.

Q. Was there not another brakeman on the train that night?
A. No, sir. He was not a brakeman; there was a student learning the business.
Q. Where is that student now?
A. I couldn't tell you. He was a student learning to be a brakeman; not in the employ of the railroad company.
Q. He is not here, is he?

Objected to as improper cross examination.

Q. Where was he riding when you left the train that night?

Objected to as incompetent, irrelevant and immaterial, not proper cross examination.
Objection overruled.

A. He was riding in the caboose.
Q. Did you see him the next morning after the accident?
A. I did.
Q. He was there at the wreck, was he not?
A. He was in the sleeping car of train number forty-four; he got injured.

87 Q. And Hutchinson is still in your employ, in the employ of the railroad company?
A. He is, yes, sir.
Q. And Miller was killed, was he not?
A. He was.
Q. Under your rules and regulations in the running of your trains under whose charge is a train when it is sent out?
A. The entire charge of the train is under the conductor.
Q. And the other members of the crew are under the conductor's orders?
A. Are subject to his orders, provided his instructions comply with the book of rules.
Q. And if they do not comply with the book of rules——
A. They do not have to comply with his instructions.
Q. They do not have to obey them. Where was Miller found after the wreck, if you know.
A. He was found alongside of the track about fifteen feet from the track to one side.
Q. To which side of the track was he found?
A. He was also on the left hand side, on the north side.
Q. How far was he found from where this engine was?
A. About, oh, I should judge, sixty feet.
Q. About sixty feet?
A. Yes, sir; back of where the engine was.
Q. Now, I refer to the engine that was thrown off the track?

88 A. The one that was thrown over, yes, sir; I should judge he was sixty feet back of that.
Q. Would that be towards the west, towards Grotto?
A. Towards the west, yes, sir.
Q. And Wiles was found, am I correct, in the ash pan of the engine?

A. No, sir; you are incorrect. He was found in the smoke box, in the front part of the engine.

Q. Will you please tell us what that smoke box is?

A. That is where the exhaust of the engine and smoke comes out, the big arch in the front of the engine that the smoke stack is on top of it. This end of the smoke box caved in when it struck this train.

Q. You don't know when it caved in, of course?

A. No, I don't.

Q. He was found then under this smoke box?

A. Partially under the smoke box and partly in the smoke box; he was turned in there with the iron in the smoke box; he and pieces of the caboose were in there together.

Q. And Miller was about sixty feet back along the track?

A. Yes, sir.

Q. Miller was back in the direction that this passenger train was coming?

A. Coming from.

Q. Did you notice anything in the hands of Wiles when you found his body?

A. No, I did not examine his hands.

89 Q. Didn't he have a lantern—the remnants of a lantern in his hands?

A. I did not examine his hands; I did not see anything.

Q. Didn't you see a broken lantern in one of his hands?

A. I did not.

Q. You did not examine him?

A. I did not examine his hands. I did not examine him minutely at all; I just saw the dirt and stuff when they pulled him out and had arranged for a man with a stretcher to take care of the body.

Q. You say your passenger train that ran into the freight was running late that night, wasn't it?

A. No, I didn't say anything about it.

Q. Do you know whether it was running late that night?

A. No, I don't know.

Q. You do know from an examination of the records that it was late?

A. I know that investigation showed that they passed Grotto two minutes late; that is practically on time.

Q. And under your rules of running your trains the passenger people had no knowledge of this freight train being ahead of them?

A. Absolutely not.

Q. Could you not have notified them that that freight train was ahead?

A. It was not necessary at all.

Q. That could have been stated in the orders that they gave them at the last station they left that number 1900 was running

90 as an extra freight ahead and on what time?

A. The last station this train stopped was at Monroe,

thirty-five miles of there; that would have been the last place. This freight train left Monroe about five hours previous to that.

Q. Have you no system under your rules by which this passenger train would have known anything about where this freight train was held?

A. No, sir, we was not required to do that.

Q. If you did have such a rule your passenger trains would know—the man running your passenger train would know he was very close to this freight train at the time of the collision, wouldn't he?

A. He would have if he had been told that.

Q. There would not have been any trouble giving him those orders, would there?

A. By stopping the train and having him sign for them.

Q. They do stop this train some times?

A. Yes, sir, but not for freight trains.

Q. Don't stop for freight trains?

A. Not unless absolutely necessary, unless there is some trouble of some description.

Q. And then they run over them, do they?

A. No, sir; if you will get acquainted with that book of rules you will see how easy it is to do those things.

Q. Number 1900 was running as an extra freight, was it not?

A. Yes, sir.

91 Q. And it was not running on any schedule time?

A. No time whatever.

Q. And under your system of running your extra freights there was no other trains or train crews had any knowledge of just where this train was running?

A. Extra trains would have, or trains running ahead in an opposite direction, or trains following running later. Schedule trains would be given run way.

Q. Do you give that to those other trains when you do not give it to regular trains?

A. Oh, yes, the regulars get it.

Q. Why didn't this passenger train get it?

A. Because she was running on time.

Q. If she was running—how many minutes late would it be necessary to give her those orders?

A. If a passenger train is only running a few minutes late they figure they do not give them any orders to run late; they let them make that up.

Q. Do you know what time this train had to go from Grotto to Skykomish and get in there ahead of the passenger's time?

A. No, I don't know.

Q. Isn't it true now, Mr. Brokaw, that this extra freight was running on what you railroad people call short time?

A. No, sir, I don't know it.

Q. Between Grotto and Skykomish?

A. I don't know it.

92 Q. Supposing then that this train was exactly on time, instead of being two minutes late, would it not have overtaken the freight before the freight reached Skykomish?

A. It possibly would provided the brakeman had not attended to his business, if he had not done his flagging as he should have done when his train was slipping down.

Q. Do you consider that proper railroading to run your trains so close together at night?

A. Yes, sir.

Q. That is good railroading?

A. Yes, sir, a passenger train has got to pass a freight train some time along the road and they have got to get close together to get by.

Q. And the reason for running them that way is to make it possible for passenger trains to make good speed?

A. Yes, sir.

Q. Well, now, do you know whether or not it was raining that night?

A. No, I don't know whether it was raining at that time or not. But I know it started to rain at Skykomish within a couple minutes afterwards. I rather think it was just about starting to rain.

Q. What effect would the rain have if it was raining there at that time upon those little lights that the brakeman would throw out?

A. It would not have any effect whatever.

Q. It would not?

A. No.

Q. The rain can't put them out?

A. No.

93 Q. Or water?

A. No, I don't think you can pour a bucket of water on them and put them out.

Q. Did you ever try it?

A. No; I have seen thousands of them, though, burning in the rain.

Q. They burn just as good in the rain as they do when it is not raining?

A. Yes, sir.

Q. Did you see Mr. Wiles' lantern? Did you find it in the wreck?

A. No, sir.

Q. Did you find the conductor's lantern?

A. We would not know one from the other.

Q. Did you find either of them?

A. Found parts of lanterns scattered all around, broken up.

Q. You did find pieces of lanterns?

A. Yes, sir.

Q. Didn't you understand from some other person that one of those pieces was found in the hands of this dead brakeman?

Objected to as incompetent as to what he might understand from somebody else.

Objection sustained.

Q. Where did you leave that freight train?

A. At Monroe, thirty-five miles west.
Q. What time in the evening was that?
A. I think in the neighborhood of six-fifty p. m.
Q. That was the time they started from there?
A. No, they left Everett along in the afternoon, about three o'clock.

94 Q. Wiles was there then, was he?
A. Yes, sir.
Q. Started out with this train?
A. Yes, sir. I don't know that he did because I left there and got on a passenger train and went ahead of him.
Q. You did not ride along with him?
A. Yes, sir, from Everett to Monroe. That is fifteen miles out of Everett and then I got off and got on a passenger train and went to Skykomish?
Q. Is that thirty-five miles to Skykomish?
A. Just about thirty-five miles.
Q. Wiles was on this freight train between Everett and Monroe?
A. Yes, sir.
Q. Did you ever know him before?
A. Yes, sir.
Q. Was he a strong, healthy young man, so far as you were able to observe?

Objected to as not proper cross examination.

Q. I simply want to know whether he was well or ill that night?

The COURT: He may answer that.

A. He did not complain any; he seemed to be well.
Q. Were you riding now on this passenger train that was in this wreck?
A. No.
Q. You came on another train?
A. I was on another train.
Q. The next morning?
A. That night.

95 C. O. FOSTER, called as a witness on the part of the defendant and being first duly sworn, testified as follows:

Q. Mr. Foster, where do you live?
A. I live in Seattle, Washington.
Q. What is your business?
A. Locomotive engineer, Great Northern.
Q. Are you a passenger engineer?
A. I have been for the last five years.
Q. Running a passenger engine continuously those last five years?
A. Yes, sir.
Q. For how long have you been an engineer?
A. Going on eleven years.
Q. How old a man are you?
A. Forty-two.

Q. Previous to being an engineer did you serve as a fireman?
A. I did.
Q. For how many years?
A. For five years.
Q. How many years in all have you been in the employ of the Great Northern Railway?
A. Going on about fifteen years.
Q. Are you the Mr. Foster who was an engineer on that head engine of passenger train forty-four that collided and ran into the caboose of extra freight 1900 between Grotto and Skykomish in October, 1910?
A. Yes, sir, I am the man.
Q. Do you know, Mr. Foster, whether or not your train left Grotto on time or was it late that night?
96 A. Two minutes late.
Q. Among railroad men is that considered on time or late?
A. It is considered about on time.
Q. Mr. Foster, in running down that night from Grotto towards Skykomish, did you see along there anywhere any fusees or any warnings of any kind to indicate that there was a freight train stalled ahead or going on your time or anything of that kind?
A. No, sir, I did not see anything.
Q. What was the first notice you had of this 1900 being stalled on the track ahead of you as you came around there with your passenger?
A. I seen the markers on the caboose; that was the first thing I seen.
Q. About how far were you from the caboose when you saw that?
A. I should judge about five or six car lengths—box car lengths—about.
Q. Did you see any brakeman or flagman or anybody out there with flags or lanterns or warnings of any kind?
A. No, sir, no one in sight at all.

Cross-examination:

Q. You were on the head engine of this passenger train?
A. I was, yes, sir.
Q. There were two engines were there attached to this passenger—hauling this passenger train?
A. Yes, sir, two engines on the head end.
97 Q. How many coaches were you hauling?
A. We had six coaches.
Q. Sir?
A. Six.
Q. And why two engines? Were you going over any mountains there?
A. We were going over the mountains, yes, sir; going over the Cascade.
Q. Is there a mountain near the scene of this accident?
A. Yes, sir; it is right near there, within a mile and a half. We always get two engines at Skykomish.

Q. At Skykomish?
A. Yes, sir, at Skykomish.
Q. But you had not got to Skykomish yet, had you?
A. No.
Q. Where did you put on your second engine this night?
A. At Enderly.
Q. You did not usually put it on there, did you, on that train?
A. No, sir, only occasionally whenever they needed an engine over to Leavenworth or Skykomish to bring a second section of some train back, if they needed an engine there they put two engines on the train there.
Q. Wasn't your train about five minutes late at Grotto?
A. No, sir. I think we were just about two minutes late.
98 Q. Did you stop at Grotto?
A. No, sir.
Q. Your train did not stop at all stations, did it?
A. No, sir.
Q. It was what was called a through train?
A. Yes, sir; we stopped at Monroe, was the last stop we made, and then Skykomish.
Q. What is the distance between Grotto and Skykomish?
A. Grotto and Skykomish—it is just about four miles.
Q. Just about four miles?
A. Just about.
Q. What kind of a night was it?
A. It was a pretty dark, misty night.
Q. Was it raining?
A. Not to amount to anything; just misting a little.
Q. Was it raining some at the time of this accident?
A. No, sir.
Q. Sir?
A. I don't think so, no, sir.
Q. But you think it was misting some?
A. Misting; yes, sir.
Q. By that you mean a light rain?
A. Yes, sir.
Q. Was it a dark, cloudy night?
A. Yes, sir, it was a dark night.
Q. Now, is there a mountain at the scene of this accident; is there a mountain on one side?
99 A. No, I would not call it a mountain; it was a kind of a high bluff, though.
Q. And close to the track?
A. Yes, sir, pretty close to the track.
Q. And what was the character of the ground on the other side of the track?
A. The other side of the track was nothing but stumps; kind of sloping down with big stumps.
Q. What point were you at when you first saw the caboose?
A. What point were I at?

Q. Yes; on the road, I mean. How far were you away from the caboose when you first saw it?
A. About five or six car lengths.
Q. And why was it that you could not have seen it before that?
A. On account of the curve and the bluffs.
Q. On account of the curve and bluffs?
A. Yes, sir.
Q. Was there quite a pronounced curve at that point?
A. Yes, sir, there was.
Q. If it had not been for the curve you could have seen it by reason of the assistance your head light would give you, at a much farther distance?
A. Certainly. On a straight track I could have seen it in time to stop.
Q. Where was your fireman when you first saw this?
A. He was on the deck, I guess, shoveling coal.
Q. Sir?
A. I think he was on the deck shoveling coal.
100 Q. You saw it first in other words, anyway, didn't you?
A. I am the man that seen it first; he could not see it.
Q. Sir?
A. The fireman could not have seen it on account of the curve not until he got right close to it, and then he would have to have his head right out of the window.
Q. When you looked out what was the first thing you saw?
A. I seen one marker first and then I see the other one.
Q. What are those markers?
A. They are red lights on the caboose; they show red on behind and green in front and on the side.
Q. And when your attention was first called to those markers what did you do?
A. I tried to stop.
Q. You tried to stop?
A. I tried to stop as quick as I could.
Q. What did you do in your effort to stop?
A. I slammed on the air and emergency.

Objected to as not proper cross examination.
Objection withdrawn.

Q. I will ask you why you did not stop your train?
A. Why I didn't?
Q. Yes.
A. Because I could not; it was impossible.
Q. Did you reverse your engine?
101 A. I did not; no.
Q. Did you blow the whistle?
A. I made a grab for the whistle and missed it.
Q. And why or how did you happen to miss it?
A. It was dark in the cab and I didn't have time——
Q. Was it not your own engine, the engine that you were used to running, was it?

A. No, sir; it was not my own engine; I don't own any engine myself.

Q. You know what I mean, Mr. Foster, you probably will if you work long enough—I hope you will?

A. No, I don't think I ever will.

Q. Did you ever run this engine before?

A. Not that I know of.

Q. Was not the reason that you missed that bell cord or whistling cord or whatever it was because you were not used to the engine?

A. It may have been.

Q. You stated that in your deposition when you were sworn up there at Seattle, didn't you?

A. I don't know; it might have been. You might make a grab for the whistle in the dark that way and miss the chain too, swinging around.

Q. You did make a grab for it, didn't you?

A. Yes, sir, I did.

Q. I suppose it did not take—assuming that you were about five car lengths away at the time you first discovered it and running at the rate of speed you were running, which was about how

102 much?

A. About thirty miles an hour I should judge.

Q. It might have been forty?

A. I don't think so.

Q. And it did not take but just an instant I suppose, to hit that caboose?

A. Not very long. You ain't got time to do very much by the time you shut the throttle off and slam on the air.

Q. Do you mean to say that under those circumstances, a dark night, misting, you acting as quickly as you did after seeing these markers in your effort to ring the bell and to stop that train, do you wish to be understood as saying that you could see a man, a brakeman or a conductor, if he had been there?

A. I certainly could.

Q. You certainly could?

A. I certainly could; I could see a flagman if he was out, or if there was a fusee burning right on that caboose on the platform I could have seen it in time because it reflects up in the air the fusee.

Q. Wasn't it a fusee you saw, Mr. Foster, when you came around that curve?

A. No, sir. A fusee or a marker on the caboose I could tell that.

Q. You could not see a fusee any further than you could a marker, could you?

A. I could, yes, sir; I could see a fusee as far——

Q. Could you there when you were coming around that curve?

A. I certainly could. A fusee reflects up in the air and it makes the whole sky red and the atmosphere.

103 Q. You state you came around a sharp pronounced curve and that there was a large hill there?

A. Yes, sir.

Q. And you could not see the train?

A. I could not see the markers. I could have seen a fusee, though, if it was burning.

Q. And the only reason then was that it would have been higher than that curve—that mountain?

A. It would have reflected up in the air, yes, sir.

Q. Would it burn just as well in wet weather as it would in dry?

A. Just the same.

Q. Did you ever see this man that was killed, Mr. Wiles?

A. I seen him, yes, sir; I was not personally acquainted with him, but I seen him on the road here and there.

Q. Did you see him after he was dead, Mr. Foster?

A. I seen him in Everett after they took him out of the baggage car and he was all wrapped up.

Redirect examination:

Q. Mr. Foster, you say that you did not reverse your engine. Tell the jury why you did not?

A. It would be useless.

Q. Why would it be useless?

A. We have the driver brake set and reverse her she would skid along and would not hold as much as the driver brakes alone.

Q. As the engineer there in that engine under that emer-
104 gency did you leave anything undone that you ought to have done to try and stop that train?

A. No, sir, I did not.

Q. Would this whistle—the blowing of that have had any effect on it one way or another?

A. Not in stopping the train, no, sir.

Q. You say you did grab for the whistle?

A. Yes, sir.

Q. You say this was an engine you had not been accustomed to running. Was the throttle and braking apparatus on that engine the same as on any other engine?

A. Yes, sir, the same; the brake valve and her equipment just the same.

Q. You say you did put on the emergency air, did you?

A. I did.

Q. What else did you do?

A. Shut the throttle off.

Q. And you did not reverse it because you say it would not be as good as it would be to leave it the way you did; is that right?

A. Useless.

Q. You got hurt, too, didn't you, in that wreck?

A. I got bruised up; I and the fireman both.

Q. You did all you could to stop it, didn't you?

A. Yes, sir.

Q. Did you have any chance to jump off, or did you stick to the engine?

A. I stayed with the engine. I didn't have hardly time after

I set the air and shut the throttle off, and being dark that
105 way, I couldn't see what kind of a place it was to jump.

Q. The fact is you stayed on?

A. When we struck the caboose I couldn't get out then because the slivers and boards and the wreckage was flying by and knocking windows out and everything; I couldn't get out.

Q. What I want to get at is under the circumstances did you do everything you could do to stop that train?

A. Yes, sir, I did.

Recross-examination:

Q. In what distance can you stop a train running at that rate of speed?

A. It all depends.

Q. Well ordinarily?

A. It all depends upon the condition the brakes are in and the condition the rails are in and everything.

Q. Well, ordinarily, assuming that they are in good condition?

A. In good condition, running thirty miles an hour the way this happened, I ought to be able to stop in seven hundred feet, anyhow.

Q. In seven hundred feet?

A. Yes, sir.

Q. And about how many hundred feet was this caboose away when you first saw the caboose?

A. One hundred feet. You say how many hundred feet?

Q. Yes.

A. There was no hundred feet.

106 Q. There was no hundred feet?

A. No, sir; there was not over seventy-five feet, I don't think; seventy-five or eighty.

Q. Then you did not see the caboose until you were within about seventy-five feet of it?

A. No, sir.

Q. That would be about how many box car lengths?

A. Well, box cars average thirty-three feet and forty-four.

Q. About two box car lengths then?

A. Forty-four feet boxes amongst thirty-two and thirty-three.

Q. You did not see it then until you came within about seventy-five feet of it?

A. No, sir.

Q. And you could not see it by reason of the curves?

A. No, sir.

Q. Can you stop an engine quicker by reversing the motion?

A. Stop her by reversing——

Q. Yes, by reversing the——

A. No, sir, I don't consider you can if you have driver brakes.

Q. Don't you always do that if you want to stop your engine suddenly and quickly, reverse the motion of her?

A. No, sir; you dassen't do it in making regular stops and——

Q. No, but in emergency cases, if you want to stop your
107 engine quickly in case of emergency such as this, don't you reverse your engine?

A. No, not if you have driver brakes.

Q. If you reverse it would it not have come to a dead stop almost?

A. It would in time, I suppose, if there was nothing ahead of you, if you did not hit anything, if you did not go in the ditch.

Q. Would it come to a stop right away in a short distance, in fifty feet?

A. No, sir.

Q. Would it come to a stop in seventy-five feet?

A. No; it would skid right along and would not stop any quicker by reversing it.

Redirect examination:

Q. It is the momentum that carries it, isn't it, is that right?

A. That is right.

Q. Now, about that seventy-five feet from the curve to where the caboose was, I don't suppose you measured it, did you, Foster?

A. I didn't measure it; that is only my judgment.

Q. That is your best judgment?

A. My best judgment, yes, sir.

Q. At any rate, you did not see the caboose lights until you got around the curve far enough so you could see it, did you?

A. No, sir.

Recess until 9 a. m.

108 W. H. BROKAW, recalled on the part of the defendant, testified as follows:

Q. Mr. Brokaw, in view of some questions of counsel yesterday relative to that student brakeman you spoke of, I will ask you if after this wreck occurred when you come upon the scene, if you saw that student brakeman?

A. Yes, sir, I saw him.

Q. Did you talk with him as to the whereabouts of brakeman Wiles and the conductor, Miller, the conductor of that freight, at and just before the time the collision occurred?

Objected to. Objection overruled.

A. I did.

Q. About how soon was that would you say after that collision occurred?

A. That was probably an hour and a half.

Q. Was this student brakeman injured?

A. He was.

Q. What did he say to you at that time as to the whereabouts of Wiles and Miller just before the wreck occurred and as to whether they had gone out of the caboose to give signals or anything of that kind?

Objected to as incompetent, irrelevant and immaterial.

Objection sustained.

Q. Do you know anything about the whereabouts of that man that student brakeman, now, whether he is in the employ of the company or has he been?

109 A. He is not in the employ of the company and never has been. I don't know where he is.

Cross-examination:

Mr. DALY: I would like to ask him one question about that freight train.

Q. Now, I wanted to simply ask you, Mr. Brokaw, by what system, if you know, a freight train is stopped after it breaks in two as this number 1900 did?

A. The brakes in the air pipes immediately sets the brakes automatically and stops the train.

Q. Do I understand then that this train after it broke in two and the part that was—the rear part we will say, that that stopped by reason of the automatic setting of the brakes and stopped immediately?

A. Yes, sir.

Q. Can that fact be detected in the caboose by the conductor and rear brakeman just as well as by the engineer in his cab?

A. Yes, sir.

Q. Why is that?

A. He has an air gauge there just the same as the engineer has. When the air disappears it shows that the train is broken. Not necessarily that the train is broken in two; the air pipe might be broken or the hose.

Q. It shows something has gone wrong with the air of the train?

A. Yes, sir; something has gone wrong with the braking power.

110 R. E. KECK, called as a witness on the part of the defendant and being first duly sworn, testified as follows:

Q. Where do you live?

A. St. Paul.

Q. You are an employee of the Great Northern Railroad?

A. Yes, sir.

Q. In what department?

A. Claim department.

Q. Have you had charge as assistant claim agent of the witnesses in this case and the investigation and preparation of the case for trial?

A. Yes, sir; indirectly it was the preparation.

Q. In that way you keep in communication with the claim department on the coast and on its different divisions?

A. Yes, sir.

Q. Do you know whether any effort has been made through you and any others to locate this student brakeman we have been talking about here?

A. Yes, sir.

Q. Have you been able to locate him?
A. No, sir.

Defendant rests.
Plaintiff rests.

At the close of the defendant's case the defendant again requests the court to direct the jury to find a verdict in favor of the defendant. Motion denied. Exception.

111

Defendant's Requests.

If the defendant's request for an instructed verdict is refused by the court, then defendant requests the court to charge the jury as follows:

(*a*) The jury is instructed that the breaking in two of defendant's freight train was not the proximate cause of the injury to plaintiff's intestate which caused his death.
Refused.

(*b*) The evidence in this case is undisputed that it was the duty of deceased, Dennis E. Wiles, as rear brakeman of defendant's freight train, to at once, upon the stoppage of the freight train at the time it broke in two, *to* go back with promptness and as speedily as he reasonably could for the purpose of protecting and giving signals to any trains which might be approaching from the rear, and, if the jury believe from the evidence in this case that he did not perform this duty as required, and that his failure to so perform it was the proximate cause of the collision which resulted in his death, then plaintiff cannot recover.
Given.

(*c*) The jury are instructed in this case that there is no evidence from which they could find that the engineer of the passenger train was guilty of any negligence in either failing to perceive the caboose of the freight train more quickly than he did, nor in failing to use the means at his command to stop his engine and prevent the collision.
Given.

112 (*d*) There is no evidence in this case that would justify the jury in finding that the defendant Railway Company was guilty of any negligence in its manner of running this freight train, nor in the manner in which the passenger train was operated, in regard to the time in which either of said trains passed Grotto station on their way to Skykomish.
Given.

(*e*) The only evidence in this case which proximately caused this collision as shown by the evidence was the negligence of plaintiff's intestate Wiles.
Refused.

(*f*) If the jury are permitted to reach the question of damages in this case the court is requested to charge the jury in that regard that, in the event plaintiff, as representative of the estate of said deceased, can only recover for the pecuniary, or money, loss

which the father of deceased, his next of kin, sustained, because of his death. No damages can be allowed on account of grief, or mental anguish, or loss of society of deceased, but the jury will be restricted on this question of damages to an amount which will fairly compensate his father, as next of kin, for the loss, in dollars and cents, sustained by him by reason of the death of his son.

Covered by general charge. Refused.

(*g*) The undisputed testimony in this case shows it to have been the duty of the deceased Wiles under the circumstances attending the operation of this freight train, in view of the approaching passenger train and the time thereof, to have dropped fusees along and upon the track in the rear of the freight train, even
113 though the freight did not break in two or stop for any reason, as a warning to the engineer of the pas-enger train, and if he did not do this and his failure so to do was the proximate cause of the collision then plaintiff cannot recover.

Given as modified.

Mr. SULLIVAN: I think in this case there ought to be some definition by the court to the jury of the meaning of the word "proximate." It has a definite meaning. It means the immediate moving cause, and the jury might not quite understand what is meant by that.

The COURT: There is a definition given in Dunnell and I will give that to the jury.

(Closing arguments.)

Charge.

Whereupon the court charged the jury as follows:

GENTLEMEN OF THE JURY: The plaintiff in this action, Mr. J. H. Wiles, brings this action as the administrator of the estate of his deceased son, Dennis E. Wiles, and in general terms he sets forth in the complaint that he is the administrator appointed for the estate of deceased, and that the deceased was an employee of the defendant railway company at and prior to the time of his death, and he charges in the complaint, in a general way,—I am not quoting directly from the complaint,—but in general terms he charges that because of the negligence of the defendant in the operation and management of its trains and in the insufficiency
114 of its train equipment and the bringing of those trains together in a collision, that the death of deceased took place, near a station called Skykomish, in the state of Washington; and he charges in a general way that the death was the result of defendant's negligence.

It is not, of course, so material as to just what the complaint charges, as it is to determine what the evidence in the case shows. It is true, however, that the plaintiff cannot recover in this action except he prove some allegation of negligence which is actually set forth in his complaint, yet the mere wording of the complaint, of course, is not controlling, but your attention is directed, in order to establish the first important question here, more particularly to

the evidence in the case, because that is, of course, what controls you.

The complaint further sets up the fact that this death occurred on the eighth day of October, 1910, and that the deceased was at the time of his death an able bodied man twenty-four years of age, and that he was able to and did earn, as it is set forth here, one hundred and twenty five dollars per month. You will remember the evidence upon that. I think the evidence shows, if I recall correctly, a lesser sum than that, but you will be governed by your recollection if that should become a material question in the case.

The answer denies these material parts of the complaint, that is, as to negligence of the defendant, and further alleges that said deceased came to his death and that the cause thereof was by
115 reason of his own lack of ordinary care and by his failure and neglect to obey reasonable and proper rules of the defendant which had been adopted for the performance of its work as a common carrier, and that said rules were well known to plaintiff's intestate; and that such lack of ordinary care and violation of the rules of defendant contributed directly and proximately to it and were in fact the causes of the injury sustained. So that these allegations set forth here in a general way, and you have heard them referred to in the complaint and the answer, constitute the issues of fact which it is necessary for you to try and determine from the evidence in the case in arriving at your verdict.

Now, it may be helpful to you to have before you some explanation of certain terms that we have used in the trial here, and which may be used in the instructions which you are given, and as an assistance to you upon that proposition I may say that in speaking of negligence in this class of cases the law construes it to mean, and it is defined in law as meaning, the want of ordinary care, that is, such care as an ordinarily prudent person would exercise under like circumstances. There is no precise definition of ordinary care, but it may be said that it is such care as an ordinarily prudent person would exercise under like circumstances, and should be proportioned to the danger and peril reasonably to be apprehended from a lack of proper prudence. This rule applies alike to the deceased and to the defendant in this action, and may be used in deter-
116 mining whether either or both of these parties were negligent.

You will, of course, understand that unless the death of this Mr. Wiles was the result of the negligence charged, and as more particularly hereafter explained to you, that there could be no recovery in this action, and so we speak of the necessity of showing that this death was occasioned as a proximate result of the negligence complained of.

Now, this word "proximate" should be, perhaps explained to you so that you may understand just what we mean by its use, and it is defined by law as follows: The word proximate as defined by law is the immediate cause—the immediate moving cause—which results in the accident complained of. I don't know that I can make that any clearer to you than by those words.

It, therefore, becomes necessary for a proper disposition of this

case for you to carefully consider all the circumstances surrounding this accident as they have been shown to you by the evidence.

First of all you start out with the proposition here that the plaintiff is obliged to make out its case by what we term a preponderance of the evidence before he can claim a recovery in this action. All of these material facts upon which he claims a right of recovery here must be shown by the preponderance of evidence, and the burden of proof rests with him to establish those claims. Then we come to the matter of considering the circumstances under which this death occurred. It is conceded here on all sides that this deceased was a servant or employee of the defendant railway company at
117 the time of his death, and it is also conceded that he met his death in that accident or collision to which reference has been made in the evidence and in the pleadings.

The theory being, of course, as I have indicated, so far as the plaintiff is concerned, that this death was the result of defendant's carelessness or negligence; while the defendant claims that it was the result solely of the deceased's disregard of his duties and the result of his own negligence.

Therefore, it becomes necessary for us to consider some of the rules which govern the rights of these parties, and some of the presumptions which obtain in the first instance, and as to whether such presumptions are overcome by the evidence in the case. And you are instructed that where a person is killed by the negligence of another a very strong presumption arises that the deceased exercised due care to save himself from personal injury or death. Of course, you understand that this persumption must and necessarily does, give way to positive evidence of facts in the case. Should you find that such positive evidence in the case, does overcome it—is sufficient to overcome it—that is a matter, of course, for your consideration. The presumption also must yield to clear proof of contributory negligence.

Now, in this case I will explain a little more fully later in regard to contributory negligence, and I caution you now not to be misled into the belief that under no circumstances can the plaintiff recover here if contributory negligence of the deceased is shown. I
118 shall explain that a little more fully to you later on.

You are also instructed that if from the evidence in this case you believe that the collision referred to in the evidence occurred on account of the fault or negligence of deceased in failing to warn or signal the approaching passenger train in time to prevent such collision, then the plaintiff cannot recover. That is, if that was the proximate cause of this collision, then the plaintiff cannot recover. It was the duty of deceased to give such warning and signal to those in charge of said passenger train, and unless the evidence here convinces your minds that because of the negligence of defendant in the operation of those trains he was prevented from the proper discharge of his duty in respect to the giving of said signals, then the plaintiff cannot recover.

You are further instructed that if you should find that the death of Dennis E. Wiles occurred by reason of an unavoidable accident,

that is to a series of happenings for which neither deceased nor defendant was to blame, then your verdict should be for the defendant.

If upon full consideration of all the evidence you should find that both defendant and deceased were negligent, yet that the accident would not have occurred but for the negligence of deceased, then plaintiff cannot recover; but if you believe that the accident occurred by reason of defendant's negligence as alleged, but that plaintiff's intestate merely contributed to the cause of defendant's neg-
119 ligence but that defendant's said acts were the proximate cause of the death of plaintiff's intestate, then your verdict should be for the plaintiff.

Now, some reference has been made here in the course of arguments at least and possibly in the course of the trial with reference to the rule of law governing what we sometimes call comparative negligence of the two parties. You may consider whether there is in this case negligence on the part of both parties, and in that respect I will give you this instruction, which will perhaps tend to explain a little more fully to you what the law is that governs a case of that kind, and you are therefore instructed: That if the death of Dennis E. Wiles occurred at the time and place as it is alleged here, and if he was an employee at the time of the defendant—and I believe there is no dispute about that—and if you should further find the fact to be that such deceased was guilty of contributory negligence on his part, that, in and of itself, will not bar a recovery by the plaintiff in this action, but, in assessing the damages, if the plaintiff should be entitled to recover here—if you come to that question, it will be your duty to diminish those damages in proportion to the amount of negligence attributable to the deceased Dennis E. Wiles.

The evidence in this case is undisputed that it was the duty of deceased, Dennis E. Wiles, as rear brakeman of defendant's freight train, to at once, upon the stoppage of the freight train at the time it broke in two, to go back with promptness and as speedily as he reasonably could for the purpose of protecting and giving
120 signals to any trains which might be approaching from the rear, and, if the jury believe from the evidence in this case that he did not perform this duty as required, and that his failure to so perform it was the proximate cause of the collision which resulted in his death, then plaintiff cannot recover.

The jury are instructed in this case that there is no evidence from which they could find that the engineer of the passenger train was guilty of any negligence in either failing to perceive the caboose of the freight train more quickly than he did, nor in failing to use the means at his command to stop his engine and prevent the collision.

There is no evidence in this case that would justify the jury in finding that the defendant railway company was guilty of any negligence in its manner of running this freight train, nor in the manner in which the passenger train was operated, in regard to the time in which either of said trains passed Grotte on their way to Skykomish.

If after a careful consideration of the evidence in this case you believe that such evidence shows that it was the duty of the de-

ceased Wiles under the circumstances attending the operation of this freight train, in view of the approaching passenger train and the time thereof, to have dropped fusees along and upon the track in the rear of the freight train (even though the freight did not break in two or stop for any reason), as a warning, to the engineer of the passenger train, and if he did not do this and his failure so to do was the proximate cause of the collision, then plaintiff cannot recover.

121 In as much as this matter of contributory negligence is for your consideration in certain phases of this case I will briefly state to you what is meant by the law as contributory negligence. It is the want of ordinary care on the part of the party injured, that is to say, the want of such care as an ordinarily prudent person would have exercised under the same or similar circumstances, which, either by itself or concurring with the negligence of the defendant, if any, proximately caused the injury.

If, after careful consideration of all of the evidence and the rules of law as they are given to you, you should find that the defendant here is not liable, then, of course, that would end the case so far as the plaintiff is concerned and it will be your duty simply to bring in a verdict in favor of the defendant: but, should you, after a careful consideration, arrive at the conclusion that the defendant here is liable in this action, then you will go to the next question in the case, and it will be your duty then to consider what damages, if any, are recoverable,—what amount of damages, if any, should the plaintiff recover for the benefit of his next of kin.

Under the laws of this state it is provided that when death is caused by the wrongful act or omission of any person or corporation, the personal representative of the decedent may maintain an action therefor if he, the decedent, might have maintained an action had he lived for an injury caused by the same act or omission. The damages recovered in such case shall be for the exclusive benefit of the surviving spouse and next of kin, to be distributed

122 to them in the same proportion as the personal property of persons dying intestate.

You will understand, of course, in this case that it is not claimed that the decedent was a married man at the time of his death, hence this action is brought for the benefit of his father. It is specifically alleged in the complaint here that the father is bringing this action for his own benefit, alleging himself to be the next of kin; but he brings the action, of course, in his representative capacity as administrator.

Now, in considering this question of damages you will be guided by the rules that have been imposed by the law. You will understand, of course, that in this case it is not a question of sentiment. You are not here to award any thing because of sympathy that you may have for the parent who has lost his son, but the whole matter, under the law, is one of dollars and cents; that is to say, what damages, if any, has the father sustained by reason of the death of his son.

If you should determine from the evidence in the case, or find,

that the defendant had been negligent in respect to some duty it owed the deceased, and if you should further find from the evidence in the case that such negligence was the proximate cause of death, you would then have to determine the amount of compensation you will allow plaintiff, and in determining the amount of such compensation you must apply the rules as they are given to you here.

123 First of all you may consider, as I have already directed your attention, the question of contributory negligence, and if you should find that although the defendant is liable that the deceased himself was negligent, then that will be one of the factors in reducing the amount of damages, and they should be reduced in proportionate amount to the contributory negligence of the deceased. The amount of such compensation must be determined from the evidence in the case and not from any outside consideration. You cannot go outside of the evidence in the case to ascertain the amount to be allowed. You cannot include in the amount of your verdict any allowance for funeral expenses, because none was asked in the complaint.

The true rule for determining the amount of compensation to be allowed plaintiff is what, in view of all the facts and evidence, was the probable pecuniary interest of the father in the continuance of the life of his son. That is, what money advantage, under all the circumstances in the case, might this parent reasonably expect to derive from the continued life of the son. In determining the amount of such compensation you are instructed that you are to take into consideration the present financial condition of the father,—remember there has been some evidence upon that,—to ascertain the probability of his needing or requiring support in the future. You will not consider the matter of the parent's financial condition; there is no evidence concerning it, and it is probably not proper for your consideration here. You may also take into consideration the number of children in the family as showing

124 the probable extent of future support from deceased; any acts of the deceased showing or tending to show whether future contributions might reasonably be expected to equal, exceed or fall short of past contributions; the fact that the deceased was of age, and that before that time his father was legally entitled to all his services and wages; that after he became of age his father was not legally entitled to his services or his wages. You make take into consideration also the age, health, habits, success and earning capacity of the deceased, in short any and all facts tending to show the probable pecuniary value of the deceased's life to his parents, whether enumerated here in these instructions or not.

You, of course, cannot allow any damages here to the plaintiff because of any loss to the society and companionship of the parents by reason of the death of his son. You cannot allow or award plaintiff any damages for the pain and suffering that you believe he may have suffered at the time of his death.

Now, gentlemen, I think that this covers substantially the rules of law so far as I can give them to you for your guidance here. You will take the case and consider it fairly as you would between two

persons. Of course, the fact that one here is a corporation and the other a private individual has nothing to do and should have nothing to do, and I am sure will have nothing to do with your disposition of the case; but take the evidence and consider it from all standpoints and first determine under these rules whether
125 there is a liability here on the part of the defendant, if there is not your verdict will simply be for the defendant. If after due consideration you find that you should award damages here to the plaintiff, then it will be your duty to insert in this verdict the amount to which you feel and believe, under all the evidence and under the rules as I have given them to you, the plaintiff is entitled to recover.

J. H. WILES, as Administrator of the Estate of Dennis E. Wiles, Deceased, Plaintiff,

vs.

GREAT NORTHERN RAILWAY COMPANY, Defendant.

Verdict.

We, the jury in the above entitled action, find a verdict in favor of the plaintiff and assess his damages at the sum of six hundred and fifty no/100 dollars.

G. H. BEAMISH, *Foreman.*

Dated at Fergus Falls, Minn., this 20th day of April, A. D. 1912.

PLAINTIFF'S EXHIBIT "A."

STATE OF WEST VIRGINIA,
In the Clerk's Office of the County Court of Preston County (in vacation), ss:

On the motion of J. H. Wiles who took the oath prescribed by law, and with A. D. Bowman his surety, entered into and acknowledged a legal bond in the penalty of One Hundred Dollars, conditioned according to law; the said J. H. Wiles is thereupon appointed
126 administrator of the estate of Dennis E. Wiles, deceased. And on the further motion of the said J. H. Wiles —— —— and —— —— are appointed appraisers of said estate.

Done before me as Clerk of said Court, on the 17 day of January, 1911.

E. C. EVERLY, *Clerk.*

STATE OF WEST VIRGINIA,
County of Preston, To wit:

I hereby certify that the foregoing is a true copy from the records of my said office.

In testimony whereof, I hereunto set my hand and affix the seal of said Court, at Kingsford, W. Va., this 7th day of October, A. D. 1911.

[SEAL.]

E. C. EVERLY, *Clerk.*

PLAINTIFF'S EXHIBIT "B."

STATE OF MINNESOTA,
County of Otter Tail:

District Court, Seventh Judicial District.

J. H. WILES, as Administrator of the Estate of Dennis E. Wiles, Deceased, Plaintiff,
vs.
GREAT NORTHERN RAILWAY COMPANY, Defendant.

It is hereby stipulated and agreed by and between the parties to the action above entitled and their respective attorneys that
127 upon the trial of said action it shall be admitted that the freight train upon which Dennis E. Wiles, deceased above named, was working as brakeman at the time he met with the accident that caused his death was then and there engaged in interstate commerce by railroad.

Dated this 11th day of April, 1912.

THOS. D. SCHALL,
Attorney for Plaintiff.
J. D. SULLIVAN,
Attorney for Defendant.

J. H. WILES, as Administrator of the Estate of Dennis E. Wiles, Deceased, Plaintiff,
vs.
GREAT NORTHERN RAILWAY COMPANY, Defendant.

Proposed Case.

GENTLEMEN: You will please take notice that the within and foregoing is hereby served upon you by defendant as its proposed case in the above entitled matter.

Dated at St. Cloud, Minn., this 8th day of June, 1912.

J. D. SULLIVAN,
Attorney for Defendant, St. Cloud, Minn.

To M. J. Daly, Esq., Perham, Minn.; and Thomas D. Schall, Esq., Minneapolis, Minn., attorneys for plaintiff.

J. H. WILES, as Administrator of the Estate of Dennis E. Wiles, Deceased, Plaintiff,
vs.
GREAT NORTHERN RAILWAY COMPANY, Defendant.

Order Settling Case.

The foregoing proposed case of defendant having been duly brought on for settlement, allowance and signature before me, the

judge of said court before whom said cause was tried, and the
128 same having been duly examined by me, I do hereby certify that it contains all of the evidence produced at the trial of said cause, and that the same is a complete and correct record of all the proceedings had therein, and the same is therefore hereby settled and allowed by me as the settled case in said action and is hereby ordered filed as such.

Dated at Moorhead, Minn., this 29 day of June, 1912.

C. A. NYE,
District Judge.

J. H. WILES, as Administrator of the Estate of Dennis E. Wiles, Deceased, Plaintiff,

vs.

GREAT NORTHERN RAILWAY COMPANY, Defendant.

Notice of Motion for Judgment Notwithstanding Verdict.

GENTLEMEN: You will please take notice that on the 29th day of June, 1912, at 10 o'clock a. m. at the chambers of Hon. C. A. Nye, the judge of the District Court before whom said cause was tried, at the court house in the city of Moorhead, Minnesota, the defendant above named will present its proposed case in the above entitled action, which has been heretofore served upon counsel for plaintiff herein, for allowance, settlement and signature, and that when so settled and allowed, defendant at said time and place and upon said case as settled and allowed by the court and upon all the files and proceedings in the above entitled action, will move said court for an order directing that judgment be entered in favor of defendant and against plaintiff notwithstanding the verdict of the jury heretofore
129 rendered in said case, which motion for judgment notwithstanding the verdict will be based upon the following grounds, to-wit:

I.

That the verdict as rendered by the jury in the above entitled action is not justified by the evidence and is contrary to law.

II.

Errors of law occurring at the trial, which errors are more specifically specified as follows:

"a."

The court erred in refusing to grant defendant's motion for an instructed verdict in its favor at the close of the testimony.

"b."

The court erred in denying defendant's motion for an instructed verdict at the close of plaintiff's testimony.

"c."

The court erred in refusing defendant's requested instruction to the jury that the breaking in two of defendant's train was not the proximate cause of the injury to plaintiff's intestate which caused his death.

"d."

The court erred in refusing to instruct the jury as requested by defendant that the only evidence in the case which proximately caused the collision which resulted in the death of plaintiff's intestate was the negligence of the deceased Wiles.

"e."

The court erred in receiving in evidence Plaintiff's
130 Exhibit "a," being the alleged letters of administration.

"f."

The court erred in refusing to give defendant's request "g" as asked for.

Dated at St. Cloud, Minn., this 8th day of June, 1912.

J. D. SULLIVAN,
Attorney for Defendant, St. Cloud, Minn.

To M. J. Daly, Esq., Perham, Minn., and Thomas D. Schall, Esq., Minneapolis, Minn., attorneys for plaintiff.

J. H. WILES, as Administrator of the Estate of Dennis E. Wiles, Deceased, Plaintiff,
vs.
GREAT NORTHERN RAILWAY COMPANY, Defendant.

Order.

Defendant's motion for an order directing that judgment be entered in favor of defendant and against plaintiff notwithstanding the verdict of the jury heretofore rendered herein, came duly on for hearing before the undersigned district judge at the city of Moorhead, Clay county, Minnesota, on the 29th day of June, 1912.

Mr. Thomas D. Schall and Mr. M. J. Daly appeared as attorneys for plaintiff. Mr. J. D. Sullivan appeared as attorney for defendant.

After argument by respective counsel and upon due consideration, it is ordered, that said motion be and the same is hereby in all things granted.

Dated July 29th, 1912.

Let judgment be entered accordingly.

By the Court:

C. A. NYE,
District Judge.

131 NOTE.—The following facts appear from undisputed evidence in this case:

First. That plaintiff's intestate was a rear brakeman on one of defendant's freight trains at the time of the accident in which he lost his life.

Second. That under the rules of defendant company of which he had knowledge, it was his duty whenever his train stopped, either between stations or at stations for any cause, to immediately and without order, go back a certain distance and with flag or lantern protect the rear of his train from approaching trains.

Third. That by reason of the pulling out of a draw-bar the freight train upon which Mr. Wiles was working broke in two thus causing it to come to a stop on the main track of defendant's railway a few miles from the station of Skykomish in the state of Washington.

Fourth. That after the train thus came to a stop and before the collision occurred in which intestate lost his life, the head brakeman on this freight train had sufficient time to and did leave the engine where he was riding, go back several car lengths, examine the draw bar which had pulled out and then start back a couple of car lengths toward the caboose.

Fifth. That at the time of the breaking in two of this train, Mr. Wiles together with the conductor and a student brakeman was riding in the caboose of said train.

Sixth. That at the time of the breaking in two of said train intestate together with other members of the crew knew from
132 the time table, if not otherwise, that the passenger train was then due or very nearly so.

The question presented by this record is whether, upon the whole evidence, taking the most favorable view of it for the plaintiff that is permissible, it is sufficient to sustain a verdict for him.

The answer to this question must therefore, turn upon the point whether as a matter of law it appears from the evidence, plaintiff's intestate was chargeable with contributory negligence in failing to observe the rule already referred to. Had he proceeded back with promptness to give the signal as required by the rule, could he not have either stopped the oncoming passenger train or at least have placed himself out of danger? This inquiry must be answered in the affirmative. No other conclusion can be fairly drawn from the undisputed facts. He had been following railroading for at least eleven months (page 7, of record), and was thus experienced; the rule in question is reasonable and intended for the protection of life, limb and property. If the undisputed evidence is to be believed then at the very time of the accident intestate was disregarding this important rule and that his omission to obey it was the proximate cause of the accident.

"Disobedience of such a rule, if it contributes directly to the injury of the employee, conclusively charges him with negligence, which will bar any recovery of damages for his injury."

Green v. Brainerd, etc., Ry. Co., 85 Minn. 318.

Nordquist v. G. N. Ry. Co., 89 Minn. 485.

133 The instant case is hardly as strong for plaintiff on the facts as,

Steele v. Red River Lumber Co., 110 Minn. 219.
McDonald v. Mpls. St. P. S. S. Ste. Ry., 108 Minn. 4.

It seems to be well settled in this and other states that it is the duty of employes of a railroad company implicitly to obey all reasonable orders or rules, and a failure so to do will defeat a recovery by an injured employee if his disobedience was the proximate cause of his injury, unless obedience was impracticable under the circumstances.

Green v. Brainers, etc., 85 Minn. 318.

In the present case no reason suggests itself why plaintiff's intestate could not have complied with the rule for he must have had as much time to do so as the head brakeman had to do what he did. It may be, as suggested by plaintiff's counsel that defendant's negligence as to the breaking in two of the freight train should be presumed, but it was not this occurrence that caused the death of Mr. Wiles; it was his failure, unexplained and unexcused by the evidence to immediately go back and signal the passenger train, which proximately caused his death.

The rule so clearly laid down by our own court, would seem to be applicable to the facts as they appear in this case:

"Where the duties of a servant in given circumstances are particularly specified in the unambiguous and reasonable rules of the master, of which the servant has knowledge and to which he
134 has assented by entering and continuing in the service, his non-obedience or disobedience of them at a time when they are capable of observance is negligence as matter of law, and is not to be judged by the undefined and varying requirements of ordinary care."

Elmgren v. C. M. & St. P. Ry. Co., 102 Minn. 41.

In view of what has already been said it is not necessary to consider the question raised by defendant as to the sufficiency of proof of plaintiff's appointment as administrator.

C. A. NYE,
District Judge.

Filed, District Court, county of Otter Tail, Aug. 1, 1912. G. H. Gard, clerk.

J. H. WILES, as Administrator of the Estate of Dennis E. Wiles, Deceased, Plaintiff,

vs.

GREAT NORTHERN RAILWAY COMPANY, Defendant.

Judgment.

The above entitled action having been duly commenced in this court and having been duly reached for trial thereafter at the general April, 1912, term of said court, M. J. Daly, Esq., appearing as attorney for the plaintiff, and J. D. Sullivan, Esq., appearing as

attorney for the defendant, and the case having been duly submitted by the court to a jury and the jury having thereafter found a verdict for plaintiff and against defendant for the sum of six hundred and fifty (650) dollars and defendant thereafter having duly settled a case and having moved said District Court for an order for judgment in its favor notwithstanding the verdict of said jury which said motion of defendant was granted by the
135 court by an order duly filed in the above entitled action with the clerk of this court on the first day of August, 1912, and defendant having thereafter had the costs and disbursements to which it was entitled in said action duly taxed and allowed by the clerk of this court at the sum of thirty-six and 52/100 ($36.52) dollars.

Now, therefore, it is determined and adjudged and it is the judgment of this court in accordance with the order of the court herein that plaintiff take nothing by this action; that the same be dismissed and that defendant Great Northern Ry. Co., recover of plaintiff the sum of thirty-six and 52/100 ($36.52) dollars, the costs and disbursements hereinbefore mentioned.

Dated at Fergus Falls, Minn., this 7th day of November, 1912.

G. H. GARD,
Clerk of District Court, Otter Tail Co.

136 STATE OF MINNESOTA,
County of Otter Tail, ss:

District Court, Seventh Judicial District.

J. H WILES, as Administrator of the Estate of Dennis E. Wiles, Deceased, Plaintiff,

vs.

GREAT NORTHERN RAILWAY COMPANY, a Corporation, Defendant.

To J. D. Sullivan, Attorney for the above named Defendant, and to G. H. Gard, Clerk of said District Court:

Please take notice. That the above named J. H. Wiles, administrator of the Estate of Dennis E. Wiles, deceased, plaintiff, appeals to the Supreme Court of the State of Minnesota, from a judgment of the said District Court entered herein on the 7th day of November, A. D. 1912, and from the whole thereof.

Dated this Eighth day of April, A. D. 1913.

THOS. D. SCHALL AND
M. J. DALY,
Attorneys for Appellant,
Minneapolis and Perham, Minnesota.

District Court, Seventh Judicial District, County of Otter Tail. J. H. Wiles, administrator of the estate of Dennis E. Wiles, deceased. Plaintiff, vs. Great Northern Railway Company, a corporation. Defendant. Notice of Appeal to Supreme Court. Thos. D. Schall & M. J. Daly, Attorneys for Appellant. Due and personal service of the within notice of appeal and appeal bond, is hereby admitted at St. Cloud, Minnesota, this — day of April, 1913. J. D. Sullivan,

Att'y for Defendant and Respondent. Due service of the within notice of appeal is hereby admitted at Fergus Falls, Minnesota, this 22nd day of April, 1913. G. H. Gard, Clerk of District Court, Otter Tail County, Minn. Filed District Court, County of Otter Tail, Apr. 22, 1913. G. H. Gard, Clerk. By A. Danielson, Deputy.

137 STATE OF MINNESOTA,
County of Otter Tail, ss:

District Court, Seventh Judicial District.

J. H. WILES, as Administrator of the Estate of Dennis E. Wiles, Deceased, Plaintiff,
vs.
GREAT NORTHERN RAILWAY COMPANY, a Corporation, Defendant.

Know all men by these presents, That J. H. Wiles as administrator of the estate of Dennis E. Wiles, deceased as principal and as sureties, are held and firmly bound unto Great Northern Railway Company, a corporation in the sum of Two Hundred Fifty Dollars, lawful money, of the United States, to be paid unto the said Great Northern Railway Company, a corporation, its heirs, executors, administrators or assigns, for which payment well and truly to be made, we jointly and severally bind ourselves, our heirs, executors and administrators firmly by these presents.

Sealed with our seals and dated this 11th day of March, 1913.

The condition of this obligation is such, that whereas the said J. H. Wiles, administrator of the estate of Dennis E. Wiles, deceased, plaintiff, has appealed to the Supreme Court of the State of Minnesota, from a judgment entered against him in said action, on November 7th, 1912, for the sum of thirty-six and 52/100 Dollars ($36.52).

Now Therefore, If the appellant shall pay all costs and charges awarded against him on such appeal, not exceeding the sum of Two Hundred and Fifty ($250.00) Dollars, then this obligation
138 which is given in pursuance of Revised Laws of Minnesota, 1905, Section 4366 shall be void; otherwise to remain in full force.

In Testimony Whereof, We have hereunto set our hands and seals this eleventh day of March, A. D. 1913.

J. H. WILES, [SEAL.]
Administrator of the Estate of Dennis E. Wiles, Deceased.
By THOS. D. SCHALL, [SEAL.]
His Attorney in Fact.
F. J. BRABEC,
A. G. SCHWARZROCK. [SEAL.]

Signed, sealed and delivered in presence of
M. J. DALY,
C. A. SOHREN,
As to Thos. D. Schall.
MARIE SHALON,
M. J. DALY,
As to F. J. Brabec and A. G. Schwarzrock.

STATE OF MINNESOTA,
County of Otter Tail, ss:

Be it known, that on the 8th day of April, A. D. 188-, before me personally came F. J. Brabec and A. G. Schwarzrock to me well known to be the same persons who executed the within bond, and each severally acknowledged the same to be his own free act and deed.

[NOTARIAL SEAL.] M. J. DALY,
Notary Public, Otter Tail County, Minn.

My commission expires Jan. 8, 1917.

STATE OF MINNESOTA,
County of Otter Tail, ss:

F. J. Brabec & A. G. Schwarzrock being duly sworn, say, each for himself, that he is one of the sureties above named; that he is a resident and freeholder of the State of Minnesota, and worth the amount of Two Hundred Fifty Dollars, specified in the within bond, above his debts and liabilities, and exclusive of his property exempt from execution.

F. J. BRABEC.
A. G. SCHWARZROCK.

Subscribed and sworn to before me this 8th day of April, A. D. 1913.

[NOTARIAL SEAL.] M. J. DALY,
Notary Public, Otter Tail County, Minn.

My commission expires Jan. 8, 1917.

139 STATE OF MINNESOTA,
County of Otter Tail, ss:

On this 11th day of March, personally appeared before me, a Notary Public within and for said County, Thomas D. Schall, to me known to be the person who executed the foregoing instrument in behalf of J. H. Wiles, administrator of the estate of Dennis E. Wiles, deceased, and acknowledged that he executed the same as the free act and deed of said J. H. Wiles, administrator of the estate of Dennis E. Wiles, deceased.

Subscribed and sworn to before me this 11th day of March, 1913.

[NOTARIAL SEAL.] M. J. DALY,
Notary Public, Otter Tail County, Minn.

My commission expires Jan. 8, 1917.

District Court, Seventh Judicial District, County of Otter Tail. J. H. Wiles, administrator of the estate of Dennis E. Wiles, Deceased, plaintiff, vs. Great Northern Railway Company, a corporation, defendant. Bond in Appeal, Supreme Court. I hereby ap-

prove the within bond and the sureties thereon. Dated April 10th, 1903. C. A. Nye, District Judge. Filed District Court, County of Otter Tail, Apr. 22, 1913. G. H. Gard, Clerk, by A. Danielson, Deputy.

140 STATE OF MINNESOTA,
County of Otter Tail, ss:

District Court, Seventh Judicial Circuit.

J. H. WILES, as Administrator of the Estate of Dennis E. Wiles, Deceased, Plaintiff,
vs.
GREAT NORTHERN RAILWAY COMPANY, a Corporation, Defendant.

Clerk's Certificate.

I, G. H. Gard, Clerk of the above named Court do hereby certify that I have compared the papers writing, to which this certificate is attached, with the original notice of appeal and bond in appeal to Supreme Court as the same appears of record and on file in the said Clerk's office, at the Court House in said County, in the above entitled cause, and that the same is a true and correct copy of the same, and the whole thereof consisting of four typewritten pages.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court at Fergus Falls this 20th day of September, A. D. 1913.

[SEAL.] G. H. GARD, *Clerk.*

(Endorsed:) Filed Sep. 22, 1913. I. A. Caswell, Clerk.

141 STATE OF MINNESOTA:

In Supreme Court, October Term, 1913.

J. H. WILES, as Administrator of the Estate of Dennis E. Wiles, Deceased, Plaintiff and Appellant,
vs.
GREAT NORTHERN RAILWAY COMPANY, a Corporation, Defendant and Respondent.

Assignments of Error.

1. The Court erred in granting defendant's motion for judgment notwithstanding the verdict, for the reason that the verdict was clearly sustained by the evidence.

2. The Court erred in directing that judgment be entered in favor of defendant and against plaintiff notwithstanding the verdict of the

jury rendered therein, for the reason that the verdict was clearly sustained by the evidence.

THOMAS D. SCHALL,
Security Bank Building, Minneapolis, Minnesota;
M. J. DALY,
Perham, Minnesota, Attorneys for Appellant.

(Endorsed:) Filed Sep. 22, 1913. I. A. Caswell, Clerk.

142 18466.

STATE OF MINNESOTA:

Supreme Court, April Term, A. D. 1914.

No. 48.

J. H. WILES, as Administrator of the Estate of Dennis E. Wiles, Deceased, Appellant,
v.
GREAT NORTHERN RAILWAY COMPANY, a Corporation, Respondent.

Syllabus.

1. The doctrine of res ipsa loquitur applies, the other conditions to its proper application obtaining, to the occurrence of an injury to an employe, when such injury is caused by the use of an appliance which it is the legal and non-delegable duty of the master to furnish and keep in a reasonably safe condition for use.

2. The pulling out of a draw-bar of a freight train affords a proper basis for the application of the doctrine of res ipsa loquitur.

3. Upon a consideration of the evidence it is held that it does not show, as a matter of law, that a brakeman, killed in a rear-end collision between two interstate trains, was guilty of negligence which was the sole proximate cause of his death.

Judgment reversed.

143 18466.

STATE OF MINNESOTA:

Supreme Court, April Term, A. D. 1914.

No. 48.

J. H. WILES, as Administrator of the Estate of Dennis E. Wiles, Deceased, Appellant,
v.
GREAT NORTHERN RAILWAY COMPANY, Respondent.

Opinion.

Action by the plaintiff as administrator of Dennis E. Wiles to recover damages caused by his death, which it is alleged resulted from

the negligence of the defendant. There was a verdict for the plaintiff. Defendant moved for judgment notwithstanding the verdict. The motion was granted. Judgment was entered. The plaintiff appeals from the judgment.

The ultimate question is whether the evidence sustains the verdict. There are three included questions:

(1) Whether the doctrine of res ipsa loquitur applies to an employe situated as the deceased was.

(2) Whether the doctrine is applicable when the injury occurs through the pulling out of a draw-bar on a freight train.

(3) Whether the negligence of the deceased, assuming him to have been negligent, was the sole proximate cause of his death.

144 The deceased was the rear brakeman on a freight train of the defendant proceeding easterly between Grotto and Skykomish, Washington, closely followed by a passenger train drawn by two engines. Both trains were engaged in interstate commerce. The freight train was running as an extra without a time-card. It was made up of some forty-six cars. It broke in two by the draw-bar pulling out of the sixth car from the engine. The train had just rounded a curve and was again on a straight track. The two parts of the train, when they came to a stop, were separated by a half of a car length. It was about one o'clock in the morning. The passenger train crashed into the freight, causing the death of decedent. His body was found in the smoke-box of the forward passenger engine. What caused the pulling out of the draw-bar is not shown. There is no direct proof that it was defective or that the defendant was negligent in the care or use of it. There is an absence of oral evidence. The plaintiff relies upon the doctrine of res ipsa loquitur in proof of negligence.

1. The doctrine of res ipsa loquitur applies, the other conditions to its proper application obtaining, to the occurrence of an injury in the relation of employer and employe, when such injury arises in the use of an appliance which it is the legal and non-delegable duty of the employer to furnish and to keep in a reasonably safe condition for use. Rose v. Minneapolis &c. Ry. Co., 121 Minn. 363; Jenkins v. St. Paul City Ry. Co., 105 Minn. 504; Olson v. Great Northern Ry. Co., 68 Minn. 155. The rule stated, and adopted by this court,

145 may fairly be said to be the better accepted one. The case at bar presents such a situation. There is no question involved of the negligence of a fellow-servant, or of the deceased himself in respect of the draw-bar, or of anyone else for the negligence of whom the defendant is not responsible to the representative of the decedent. If the situation is one to which the doctrine of res ipsa loquitur would apply if the deceased had been a stranger it applies, under the circumstances of this case, to the plaintiff's intestate as an employe.

2. The next question is whether the pulling out of the draw-bar affords a proper basis for the application of the doctrine of res ipsa loquitur. The limits of the doctrine are stated in 4 Wigmore, § 2509, as follows:

"(1) The apparatus must be such that in the ordinary instance

no injurious operation is to be expected unless from a careless construction, inspection or user; (2) Both inspection and user must have been at the time of the injury in the control of the party charged; (3) The injurious occurrence or condition must have happened irrespective of any voluntary action at the time by the party injured."

This is substantially the doctrine stated in Jenkins v. St. Paul City Ry. Co., 105 Minn. 504, and in Olsen v. Great Northern Ry. Co., 68 Minn. 155.

In Rose v. Minneapolis &c. Ry. Co., 121 Minn. 363, following the principle of the other cases, the doctrine was applied to the
146 bursting of the air hose on a moving train. A number of applications are given in the notes to 4 Labatt on Master & Servant, (2nd ed.) § 1601, 3 Bailey Per Inj. § 797, and 4 Wigmore, § 2509. Not all are consistent. The case of Looney v. Metropolitan R. Co., 200 U. S. 480, is without application. It illustrates the general rule that negligence cannot be inferred from an accident, and not the exceptional situation to which the doctrine of res ipsa loquitur applies. It is urged by the defendant that the pulling out of a draw-bar is not of such unusual occurrence that it furnishes a legitimate basis for the application of the doctrine. The instances of the pulling apart of draw-bars are many; but compared with the constant use of so large a number of draw-bars a parting is unusual. Careless construction, inspection or user must usually account for the parting. In connection with the language already quoted, Dean Wigmore makes this observation:

"It may be added that the particular force and justice of the presumption, regarded as a rule throwing upon the party charged the duty of producing evidence, consists in the circumstance that the chief evidence of the true cause, whether culpable or innocent, is practically accessible to him but inaccessible to the injured person."

This expresses the good sense of the rule; and its application puts no unjust burden on a defendant who furnishes and has control of the instrumentality through which the injury comes,
147 and who, from a practical standpoint, is the only one in possession of evidence which will explain the cause of the occurrence. The defendant in possession of the appliance and in charge of the operation of the train can, without undue hardship, ascertain its condition and preserve evidence of it. Unless the rule of res ipsa loquitur applies the substantial result is that one, however innocently injured through the pulling out of a defective draw-bar, or the representatives of one killed, cannot successfully maintain an action for the injury or death because of his inability to obtain evidence of the precise defect. The application of the doctrine is in aid of the fair administration of justice and is not unjust to the defendant.

The situation here involved renders applicable the doctrine of res ipsa loquitur and the jury were justified in finding negligence from the fact of the accident.

We pass, as unnecessary to the determination of the case, the question whether the defendant could be held liable for negligence

in permitting its two trains to run so near together without further precautions to avoid a rear end collision.

3. Both trains were engaged in interstate commerce. If the injury resulted from the concurring negligence of the deceased in failing to warn the approaching train, and of the railway company in failing to furnish a proper appliance in the way of a draw-bar, the doctrine of comparative negligence is applicable under
148 the Federal Employers' Liability Act of April 22, 1908, 35 Stat. 65. See Delk v. St. Louis &c. R. Co., 220 U. S. 580; Schlemmer v. Buffalo &c. Ry. Co., 220 U. S. 590; Mondou v. New York &c. R. Co., 223 U. S. 1; Denoyer v. Railway Transfer Co., 121 Minn. 269, 141 N. W. 175; McDonald v. Railway Transfer Co., 121 Minn. 273; 141 N. W. 177; La Mere v. Railway Transfer Co., 145 N. W. 1068. The court submitted the question of comparative negligence to the jury. The judgment notwithstanding the verdict was granted upon the theory that the deceased was negligent and that his negligence was the proximate cause of the injury and that it could not be found that the case was one of the concurring negligence of the deceased and of the railway company. Assuming, without deciding, that the deceased was negligent as a matter of law, we do not think the result stated follows. The claim is that the deceased should have thrown out fusees to warn the approaching passenger train, and that when the freight train stopped, upon its breaking apart, he should have gone back and placed a signal for the approaching passenger train. Conceding that the deceased was negligent, we do not think it follows as a matter of law that his negligence was the sole proximate cause of his death. The question, putting it favorably to the defendant, was for the jury whether the negligence of the deceased, conceding him to have been negligent, was the sole proximate cause, or, with the negligence of the defendant, a concurring cause, making applicable the comparative
149 negligence rule as to damages. The question of proximate cause is usually one of fact. Schumaker v. St. Paul & D. R. Co., 46 Minn., 39; Jensen v. Commodore Mining Co., 94 Minn. 53; Morey v. Shenango Furnace Co., 112 Minn. 528; Healy v. Hoy, 115 Minn. 321; Gillespie v. Great N. Ry. Co., 144 N. W. 466; Milwaukee &c. Ry. Co. v. Kellog, 94 U. S. 468. "It is always to be determined on the facts of each case upon mixed considerations of logic, common sense, justice, policy and precedent. * * * The best use that can be made of the authorities on proximate cause is merely to furnish illustrations of situations which judicious men upon careful consideration have adjudged to be on one side of the line or the other." 1 Street Found. Leg. Liab. 110. The thought expressed in the quotation is stated in substantially equivalent language in Schumaker v. St. Paul & D. R. Co., supra. Healy v. Hoy, supra, and Moores v. N. P. Ry. Co., 108 Minn. 100. Under the federal statute contributory negligence reduces damages but does not prevent a recovery; and we think the trial court was in error in holding that the sole proximate cause of defendant's death was his negligence.

The defendant moved for judgment notwithstanding the verdict

and not in the alternative. Upon the going down of the remittit
judgment will be entered on the verdict. Judgment reversed.

DIBELL, *C.*

150 No. 18466. State of Minnesota Supreme Court. J. I
Wiles, Adm'r, Appellant, vs. Great Northern Ry. Co., R
spondent. Opinion and Syllabus. Filed May 8, 1914. I. A. Ca
well, Clerk. Dibell, C.

151 STATE OF MINNESOTA:

In Supreme Court, April Term, 1914.

No. 48.

J. H. WILES, as Administrator of the Estate of Dennis E. Wiles
Deceased, Appellant,

vs.

GREAT NORTHERN RAILWAY COMPANY, Respondent.

Petition by Respondent for Rehearing.

M. L. Countryman and A. L. Janes, Attorneys for Respondent,
St. Paul, Minn.

(Endorsed:) Filed May 16, 1914. I. A. Caswell, Clerk.

152 STATE OF MINNESOTA:

In Supreme Court, April Term, 1914.

No. 48.

J. H. WILES as Administrator of the Estate of Dennis E. Wiles,
Deceased, Appellant,

vs.

GREAT NORTHERN RAILWAY COMPANY, Respondent.

Petition by Respondent for Rehearing.

Now comes the above named respondent, Great Northern Railway Company, and respectfully prays the court to grant a rehearing in this case upon the following grounds:

First. That this court has inadvertently overlooked and failed to give proper weight and effect to the decisions of the Supreme Court of the United States holding that the doctrine of res ipsa loquitur is not applicable to cases of injury to an employe.

Second. That this court has inadvertently overlooked and failed to follow and give effect to the decisions of the Federal Court and of the United States Supreme Court with regard to the doctrine
153 of res ipsa loquitur, whereas this court in an action brought to recover damages under the Federal Employers' Liability

Act cannot base its decision otherwise than upon the Act of Congress and the decisions of the Federal Courts governing such cases.

Third. That this court has inadvertently overlooked and failed to apply and give effect to the law of this case as settled in the trial court by its instructions, to which no exception was taken by plaintiff and as to which no error has been assigned in this court.

Argument.

1. This action was brought to recover damages for the death of Dennis E. Wiles while engaged in interstate commerce as a brakeman employed by defendant in connection with the operation of an interstate freight train. It was undisputed that both defendant and the deceased were engaged in interstate commerce at the time of his death. It is so stated by this court in paragraph 3 of the opinion. The fact that the deceased was guilty of negligence in violating a rule of his employer requiring him to protect the rear end of his train is not contradicted in the opinion. Such negligence at common law and under the established doctrine of this court would entirely defeat recovery. This court now holds that notwithstanding such negligence plaintiff is entitled to recover under the Federal Employer's Liability Act upon the sole ground that the defendant was also guilty of negligence which was a concurring cause of the accident and death, and that therefore under the Federal Act
154 the comparative negligence rule as to damages became applicable.

In reaching this conclusion this court has held that although there was no negligence proven against defendant either as to failure to make proper inspection or as to the existence of any defect in machinery or instrumentalities, or as to improper methods in the operation of either of the trains, still the jury were justified in finding defendant negligent, merely from the undisputed fact that the freight train on which the deceased was riding broke in two, caused by the pulling out of a drawbar between two of the cars in the train. In its opinion the court said:

"There is no direct proof that it (the drawbar) was defective or that the defendant was negligent in the care or use of it. There is an absence of oral evidence."

To arrive at the result stated, this court adopted in its broadest application the doctrine of res ipsa loquitur. It is admitted by this court that "the instances of the pulling apart of drawbars are many," but the court states, evidently as its own conclusion from matters within its knowledge, but not disclosed by any evidence in the case, that "careless construction, inspection or user must usually account for the parting."

In support of its conclusion that this case is governed by the doctrine of res ipsa loquitur this court cites its own previous decisions in the Rose, Jenkins and Olson cases, and also quotes from Wigmore
155 on Evidence. It is clear, however, that in arriving at its decision in this case this court did not attempt to determine what the rule of the Federal Courts is as to the application of

the doctrine of res ipsa loquitur in cases under the Employer's Liability Act, as between master and servant. If this case is to be governed by Minnesota decisions in common law actions, or by the laws and decisions of the courts in the state of Washington, where the accident happened, no doubt this court would not be open to criticism for not seeking to ascertain or follow the Federal doctrine. The important fact is that this case must be determined, and the rights and liabilities of the plaintiff and the defendant ascertained and enforced, not according to any law or judicial decision of the state of Washington, and not according to the previously declared views of any court in Minnesota based on common law or state enactment, but exclusively by the Act of Congress known as the Federal Employer's Liability Act, precisely as if the action had been brought in a Federal Court. The action is brought upon a law of the United States, and while the state courts have been given concurrent jurisdiction to enforce that law, they must of necessity enforce it as a Federal law (sitting for that purpose as a Federal Court) and in harmony with the interpretation which has been or may be given to that law by the Federal Courts. The court of last resort (by writ of error) in this case, and in all cases arising under the Act of Congress, in the United States Supreme Court, and its decisions upon questions arising as to the rights of either party under the Act must of necessity be binding upon all state courts.

Liability on the part of the defendant in this case under
156 the Employer's Liability Act can only exist where defendant has been guilty of negligence. Such is the express language of the Act. If negligence be not shown, immunity from liability follows. In the present case the plaintiff produced no evidence of negligence in any respect. It was shown merely that the freight train broke in two, caused by the pulling out of a drawbar, which resulted in the immediate stopping of the train. Some five minutes later a passenger train came around a curve and crashed into the caboose, killing the deceased, who was at that time in the caboose instead of being out with a flag and torpedoes to protect his train as required by the rules. No attempt was made to show that the train was improperly handled, or that the drawbar in question was defective, or that it had not been properly inspected at the last division point.

Those facts upon their face conclusively show that under the Federal Employer's Liability Act there can be no recovery against defendant in this case, because of the failure to prove any negligence. The court undertakes to supply the missing link by resorting to a presumption of negligence under the doctrine of res ipsa loquitur. This we submit is error on the part of this court, if that doctrine cannot properly be applied to cases arising under the Federal Employer's Liability Act. We maintain that the doctrine of res ipsa loquitur cannot be applied in any case arising under that Act, as is clearly shown by the following decisions of the United States Supreme Court:

Patton v. Texas & Pacific Ry. Co., 179 U. S. 658, 45 Law. Ed. 361.

157 Looney v. Metropolitan R. Co., 200 U. S. 480, 50 Law. Ed. 564.

Texas & Pacific R. Co. v. Barrett, 166 U. S. 617, 41 Law. Ed. 1136.

In the Patton case suit was brought by a locomotive fireman for injuries sustained by the turning of a loose step on the engine as he placed his foot upon it. There was no evidence of actual defect, and the trial judge ruled that the jury could not infer negligence from the facts and physical circumstances of the accident. This ruling was sustained by the Supreme Court and the following principles were declared as applicable to that case:

"First. That while, in the case of a passenger the fact of an accident carries with it a presumption of negligence on the part of the carrier, a presumption which in the absence of some explanation or proof to the contrary, is sufficient to sustain a verdict against him, for there is prima facie a breach of his contract to carry safely (citing cases), a different rule obtains as to an employe. The fact of accident carries with it no presumption of negligence on the part of the employer; and it is an affirmative fact for the injured employe to establish that the employer has been guilty of negligence. Texas & Pacific R. Co. v. Barrett, 166 U. S. 617.

Second. That in the latter case it is not sufficient for the employe to show that the employer may have been guilty of negligence; the evidence must point to the fact that he was. And where the testimony leaves the matter uncertain and shows that any one of half a dozen things may have brought about the injury, and for

158 some of which the employer is responsible and for some of which he is not, it is not for the jury to guess between these half a dozen causes and find that the negligence of the employer was the real cause, when there is no satisfactory foundation in the testimony for that conclusion. If the employe is unable to adduce sufficient evidence to show negligence on the part of the employer, it is only one of the many cases in which the plaintiff fails in his testimony; and no mere sympathy for the unfortunate victim of an accident justifies any departure from settled rules of proof resting upon all plaintiffs.

Third. That while the employer is bound to provide a safe place and safe machinery in which and with which the employe is to work, and while this is a positive duty resting upon him, and one which he may not avoid by turning it over to some employe, it is also true that there is no guaranty by the employer that place and machinery shall be absolutely safe (citing numerous decisions). He is bound to take reasonable care and make reasonable effort; and the greater the risks which attend the work to be done and machinery to be used, the more imperative is the obligation resting upon him. Reasonable care becomes, then, a demand of higher supremacy; and yet in all cases it is a question of the reasonableness of the care; reasonableness depending upon the dangers attending the place or the machinery."

Further on in its opinion, the court says:

"No one can say from the testimony how it happened that the

step became loose. Under those circumstances it would be
159 trifling with the rights of parties for a jury to find that the plaintiff had proved that the injury was caused by the negligence of the employer."

The case above referred to seems to have presented exactly the kind of circumstances which this court has heretofore held in the decisions cited in its opinion herein give rise to a presumption of negligence and call for the application of the doctrine of res ipsa loquitur. The cause of the accident, the turning of the step, was one which would not ordinarily occur or "be expected unless from a careless construction, inspection or user," and yet the Supreme Court of the United States holds in the plainest language that there can be no recovery by an injured employe without affirmative proof that the accident happened by reason of some failure for which the employer is liable. The court declared that the fact of accident carries with it no presumption of negligence on the part of the employer; that it is an affirmative fact for the injured employe to establish that the employer has been guilty of negligence. This is certainly a denial by the highest court in the land of the applicability of the doctrine of res ipsa loquitur to cases between railroad companies and their employes.

In the case of Texas & Pacific R. Co. v. Barrett, 166 U. S. 617, referred to in the Patton case, the plaintiff, a foreman in charge of a switch engine, was injured by the explosion of another engine with which he had nothing to do and which had been placed by another employe on an adjoining track in the yard, with steam up,
160 ready to take out a train. It was claimed that proof of the fact of explosion made a prima facie case of negligence on the part of the railroad company. The trial court charged the jury as follows:

"The mere fact that an injury is received by a servant in consequence of an explosion will not entitle him to a recovery, but he must, besides the fact of the explosion, show that it resulted from the failure of the master to exercise ordinary care either in selecting such engine or in keeping it in reasonably safe repair."

Also that

"The burden of the proof is on the plaintiff throughout this case to show that the boiler and engine that exploded were improper appliances to be used on its railroad by defendant; that by reason of the particular defects pointed out and insisted on by plaintiff the boiler exploded and injured plaintiff."

The Supreme Court of the United States held that these instructions correctly stated the applicable rule of law.

In the case of Looney vs. Metropolitan R. Co., 200 U. S. 480, a street railway pitman was killed by coming in contact with uninsulated parts in adjusting the leads connecting the motive power of a street car with the overhead current. A verdict was directed for the defendant and a writ of error taken to the United States Supreme Court, and that court held that no recovery could be had upon the facts. The court said:

"But on the other hand plaintiff must establish grounds of lia-

bility against the defendant. To hold a master responsible
161 a servant must show that the appliances and instrumentalities furnished were defective. A defect cannot be inferred from the mere fact of an injury. There must be some substantive proof of the negligence. Knowledge of the defect or some omission of duty in regard to it must be shown. * * * Plaintiff in the case at bar introduced no evidence whatever of a defect in the leads or that leaks were likely to occur or the amount or degree of inspection necessary to discover them, or that there was an omission of inspection. * * * A presumption in the performance of duty attends the defendant as well as the person killed. It must be overcome by direct evidence. One presumption cannot be built upon another."

The court also cited its previous decision in the Barrett case and thus re-stated the doctrine of that case:

"The plaintiff (defendant in error in this court) was a foreman in charge of a switch engine, and was injured by the explosion of a boiler of another engine. There was evidence tending to prove that the boiler was and had been in a weak and unsafe state by reason of the condition of the stay bolts, and that if a well-known test had been applied the condition of the bolts would have been discovered. The circuit court instructed the jury that the mere fact of the injury received from the explosion would not entitle plaintiff to recover; that, besides the fact of explosion, he must show that the explosion resulted from the failure of the railroad company to exercise ordi-
162 nary care either in selecting the engine or in keeping it in reasonably safe repair. The court also instructed the jury that the burden of proof was on the plaintiff throughout the case to show that the boilers and engines that exploded were improper appliances to be used on its railroad by the defendant; that by reason of the particular defects pointed out and insisted on by the plaintiff the boiler exploded and injured him, and the plaintiff was ignorant of the defects, and did not, by his negligence, contribute to his injury. Passing on these instructions, this court said that they laid down the applicable rule with sufficient accuracy, and in substantial conformity with the views of this court expressed in prior cases which were cited."

The last case in the United States Supreme Court in which the doctrine of res ipsa loquitur is referred to is the case of Southern Ry. etc. Co. v. Bennett, decided April 6, 1914. That was an action brought to recover for the death of a fireman caused by the falling of his engine through a burning trestle bridge. There was evidence tending to show that the trestle was more or less rotten, that the fire was caused by the dropping of live coals from an earlier train and that the engine might have been stopped had a proper lookout been kept. In the Supreme Court, complaint was made against an instruction to the effect that if a servant is injured through defective instrumentalities it is prima facie evidence of the master's negligence and that the master assumes the burden of showing that he exercised due care in furnishing them. Dealing with this instruction in the light of the evidence, the Supreme Court said:

"Of course the burden of proving negligence in a strict
163 sense is on the plaintiff throughout, as was recognized and stated later in the charge. The phrase picked out for criticism did not controvert that proposition but merely expressed in an untechnical way that if the death was due to a defective instrumentality and no explanation was given, the plaintiff had sustained the burden. The instruction is criticised further as if the judge had said res ipsa loquitur—which would have been right or wrong according to the res referred to. The Judge did not say that the fall of the engine was enough, but that proof of a defect in appliances which the Company was bound to use care to keep in order and which usually would be in order if due care was taken was prima facie evidence of neglect. The instruction concerned conditions likely to have existed for some time (defective ash pan or damper on the engine and rotten wood likely to take fire), about which the company had better means of information than the plaintiff, and concerning which it offered precise evidence, which, however, did not satisfy the jury. We should not reverse the judgment on this ground, even if an objection was open to an isolated phrase to which no attention was called at the time."

It is obvious from the language of the court above quoted that if in that case there had been no evidence except the mere fact that the engine fell through a burning bridge, the instruction would have been declared erroneous and the decision reversed on that ground.

The doctrine established by the Supreme Court in the Pat-
164 ton case and other cases here referred to has been often recognized and followed in the Federal Courts:

Chicago etc. R. Co. v. O'Brien, 67 C. C. A. 421, 122 Fed. 539.
Shandrew v. Chicago etc. R. Co., 73 C. C. A. 430, 142 Fed. 320.
Mexican C. R. Co. v. Townsend, 52 C. C. A. 369, 114 Fed. 737.
Mountain Copper Co. v. Van Buren, 59 C. C. A. 229, 123 Fed. 61.
Pearce v. Kile, 26 C. C. A. 201, 80 Fed. 865.
Butler v. Frazee, 25 App. D. C. 392.
O'Connell v. Pa. R. C., 55 C. C. A. 483, 118 Fed. 989.
N. P. R. Co. v. Dixon, 139 Fed. 737.

As opposed to the Federal doctrine which we hold must govern this case, the following argument is advanced by this court to justify the adoption of the res ipsa rule.

"Unless the rule of res ipsa loquitur applies, the substantial result is that one however innocently injured through the pulling out of a defective drawbar, or the representatives of one killed, cannot successfully maintain an action for the injury or death because of his inability to obtain evidence of the precise defect."

We urge that the soundness of a proposed rule of law can never be tested by such reasoning as the foregoing. The question is not whether the plaintiff in a given case may or may not be able to prove a defect for which the defendant is liable. The question is, how

much evidence is necessary under the Federal Employers' Liability Act to justify a jury in finding that the accident happened by reason of a defect for which the defendant was responsible,
165 on the ground of a failure to exercise reasonable care in providing or inspecting suitable machinery and instrumentalities. It is true that in a particular case, or indeed in many cases, employes innocently injured may not be able to make out a case of liability, but that consideration hardly justifies a court in departing from established rules as to the burden of proof. The defendant, as well as the plaintiff, has some right which courts are bound to respect. For instance, it is by no means unheard of that castings after due inspection have broken while in use. Is there any greater probability that the particular casting known as a drawbar in this case was defective in such way as to be discovered by ordinary inspection, than that it contained a latent concealed defect which could not be discovered until the accident revealed it?

2. This court has not only held that the company was negligent presumptively under the res ipsa loquitur doctrine, but has gone, as it was then obliged to go, much further and has held that that negligence was actually a concurring cause of the disaster, within the meaning of the Federal Employers' Liability Act. We think there is no Federal decision nor any language in the Act, to justify such a conclusion. True, the train broke in two and thereupon stopped on the main line between two stations. As a matter of fact the evidence showed that even without such breaking in two it was extremely doubtful if the decedent's train could have reached the next station in time to clear for the passenger train. The breaking in two and the stopping of that train did not in any way injure the de-
166 ceased. The only result of the breaking in two was the automatic application of the air brakes and the stopping of all the cars. Thus there was presented a condition (by no means unusual) which called upon the deceased to take certain prompt action for the protection of his train and any other train that might be approaching from the rear. It was his special duty, under the terms of his employment and the positive rules of the company which governed him, to leave his train, go back along the track as far as he could and with flag or lantern, fusees and torpedoes give warning to the approaching train. This he did not do, and his death was the consequence of his omission to perform his plain duty when that condition arose. He remained in the caboose, of course with knowledge that his train had stopped. Suppose that instead of five minutes, an hour had elapsed before the passenger train collided with his caboose, and that during all that time, with knowledge of his duty, he remained in the caboose, making no attempt to protect the rear end of his train. Would this court still insist that a concurring cause of his death was the pulling out of a drawbar an hour previously? There is no distinction in principle between the case supposed and the actual facts. The deceased had five minutes in which to act. He did nothing. He might as well have been asleep on duty. If the pulling out of the drawbar was a concurring cause in this case it would not cease to be a concurring cause if the collision

were postponed for hours. Again, suppose that after the drawbar pulled out the deceased had left the caboose and had gone down the track, as his duty required him to do, for the purpose of
167 flagging the approaching train, and that while so walking along the track he accidentally stumbled and broke his leg, would this court hold that the breaking in two of his train was a concurring cause of his broken leg? Is there any distinction between that case and the one at bar?

It seems to us that the position taken by this court in this case, in respect to the doctrine of res ipsa loquitur, proximate cause, and concurring negligence, amounts to holding that the Employers' Liability Act makes interstate carriers practically insurers of the safety of their train employes, notwithstanding the language of the Act plainly restricts liability to cases of negligence proven and established as a fact. Thus the decision deprives this defendant of the protection to which it is entitled under the Act.

3. *The Law of the Case.*

The trial court charged the jury with respect to the negligence of the deceased and upon the question of proximate cause, as follows:

"You are also instructed that if from the evidence in this case you believe that the collision referred to in the evidence occurred on account of the fault or negligence of deceased in failing to warn or signal the approaching passenger train in time to prevent such collision, then the plaintiff cannot recover. That is, if that was the proximate cause of this collision, then the plaintiff cannot recover. It was the duty of deceased to give such warning and signal to those in charge of said passenger train, and unless the evidence here convinces your minds that because of the negligence of defendant in the operation of those trains he
168 was prevented from the proper discharge of his duty in respect to the giving of said signals, then the plaintiff cannot recover." (p. b. p. 118).

The foregoing instruction was not challenged or excepted to by plaintiff at the trial, nor was any error assigned with regard to it in this court.

The trial court further charged the jury, as follows:

"If upon full consideration of all the evidence you should find that both defendant and deceased were negligent, yet that the accident would not have occurred but for the negligence of deceased, then plaintiff cannot recover." (p. b. p. 118.)

The foregoing instruction was not challenged or excepted to by plaintiff, nor was any assignment of error made with regard to it in this court.

The court further charged the jury, as follows:

"The evidence in this case is undisputed that it was the duty of deceased, Dennis E. Wiles, as rear brakeman of defendant's freight train, to at once, upon the stoppage of the freight train at the time it broke in two, to go back with promptness and as speedily

as he reasonably could for the purpose of protecting and giving signals to any trains which might be approaching from the rear, and, if the jury believe from the evidence in this case that he did not perform this duty as required, and that his failure to so perform it was the proximate cause of the collision which resulted in his death, then plaintiff cannot recover." (p. b. pp. 119-120.)

The foregoing instruction was not challenged or excepted
169 to by plaintiff, nor was any assignment of error made with regard to it in this court.

The court further charged the jury, as follows:

"If after a careful consideration of the evidence in this case you believe that such evidence shows that it was the duty of the deceased Wiles under the circumstances attending the operation of this freight train, in view of the approaching passenger train and the time thereof, to have dropped fusees along and upon the track and in the rear of the freight train (even though the freight train did not break in two or stop for any reason), as a warning, to the engineer of the passenger train, and if he did not do this and his failure so to do was the proximate cause of the collision, then plaintiff cannot recover." (p. b. p. 120.)

The foregoing instruction was not challenged or excepted to by the plaintiff, nor was any assignment of error made with regard to it in this court.

Plaintiff, appellant, complains in this court that it was error for the trial court to set aside the verdict rendered in his favor. In other words, he contends that the verdict was right and should be allowed to stand. It is the settled law everywhere, and particularly in this court, that a party who seeks to retain the benefit of a verdict or decision is bound by the theory of law under which such verdict or decision was rendered. He cannot blow hot and cold at the same time. If he says the verdict was right, he is also bound by the instructions under which the verdict was obtained. Applying this well-known rule, plaintiff cannot be heard in this court to deny or question the correctness of the instructions of the trial court above quoted. There is, as the trial court in
170 his memorandum says, no dispute whatever as to the duty of the deceased to leave the caboose and go back along the track for the purpose of warning the on-coming passenger train. There is no dispute that he neglected this duty. The conclusion is irresistible that the collision in which he lost his life was directly caused by his failure to perform his duty in that respect, therefore under the instructions of the trial court as above quoted, it was the duty of the jury to find a verdict in favor of defendant, and the trial court rightly set aside their verdict and ordered judgment for defendant. An examination of appellant's brief will show that his contentions in this court are squarely opposed to the theory of the law as adopted and applied by the trial court in this case. We respectfully submit that there is no reason why this court should, upon plaintiff's appeal, reinstate a verdict which ought not to have been rendered upon the theory of law of the trial court, acquiesced in by plaintiff

at the trial, but contrary to what this court thinks the trial court should have charged. Instructions satisfactory to the plaintiff for the purposes of the trial must be held equally satisfactory for the purposes of his appeal.

In conclusion we respectfully urge that the decision of this court denies to defendant a right under a law of the United States, the Federal Employers' Liability Act, in that this court by said decision holds defendant liable on the ground of negligence while engaged in interstate commerce, in the absence of any proof of negligence, which is contrary to said Act of Congress and in opposition
171 to the law as established by the United States Supreme Court in such cases.

M. L. COUNTRYMAN AND
A. L. JANES,
Attorneys for Great Northern Railway Company, Respondent.

172 STATE OF MINNESOTA:

Supreme Court, General April Term, A. D. 1914.

Friday morning, June 5, 1914, 9:30 o'clock. Court convened pursuant to adjournment.

J. H. WILES, as Administrator of the Estate of Dennis E. Wiles, Deceased, Appellant,
vs.
GREAT NORTHERN RAILWAY COMPANY, Respondent.

Ordered, that the petition for reargument herein be and the same hereby is denied and stay vacated.

173 STATE OF MINNESOTA:

Supreme Court, General April Term, A. D. 1914.

Tuesday morning, 9:30 o'clock, April 14, A. D. 1914. Court convened pursuant to adjournment.

Reg. No. 18466. Cal. No. 48.

J. H. WILES, as Administrator of the Estate of Dennis E. Wiles, Deceased, Appellant,
vs.
GREAT NORTHERN RAILWAY COMPANY, Respondent.

This cause came on to be heard this day upon the return to the appeal herein.

Thereupon the same was argued by counsel, submitted to the court for decision and taken under advisement.

A true record.

Attest:

I. A. CASWELL, *Clerk.*

The foregoing is a full and true copy of the Minutes of Argument in the above entitled cause.

Attest:

[Seal of the Supreme Court, State of Minnesota.]

I. A. CASWELL, *Clerk*,
By —— ——, *Deputy*.

(Endorsed:) Filed June 5, 1914. I. A. Caswell, Clerk.

174 STATE OF MINNESOTA:

Supreme Court, April Term, A. D. 1914.

No. 48.

J. H. WILES, as Administrator of the Estate of Dennis E. Wiles, Deceased, Appellant.

vs.

GREAT NORTHERN RAILWAY COMPANY, Respondent.

Appeal from District Court, Seventh Judicial District, County of Otter Tail.

This cause having been duly argued and submitted at the General April Term of this court A. D. 1914 upon the return to the appeal herein.

Now, after full and mature deliberation had thereon, it is here and hereby ordered that the judgment of the Court below, herein appealed from, be and the same hereby is, in all things reversed with directions to enter judgment upon the verdict and that judgment be entered accordingly.

Entered June 5 A. D. 1914.

By the Court.

Attest:

I. A. CASWELL, *Clerk*.

I hereby certify that the foregoing is a full and true copy of the original Order for judgment entered in the above entitled cause.

Attest:

[Seal of the Supreme Court, State of Minnesota.]

I. A. CASWELL, *Clerk*.

(Endorsed:) Filed June 5, 1914. I. A. Caswell, Clerk.

175 State of Minnesota, Supreme Court, April Term, A. D. 1914.

No. 48.

J. H. WILES, as Administrator of the Estate of Dennis E. Wiles, Deceased, Appellant,

vs.

GREAT NORTHERN RAILWAY COMPANY, Respondent.

Pursuant to an order of Court duly made and entered in this cause June 5 A. D. 1914.

It is here and hereby determined and adjudged that the judgment of the Court below, herein appealed from, to-wit, of the District Court of the Seventh Judicial District, sitting within and for the County of Otter Tail be and the same hereby is in all things reversed with directions to enter judgment upon the verdict.

And it is further determined and adjudged that the Appellant above named, do have and recover of said Respondent herein the sum and amount of One Hundred Twenty and 65/100 Dollars, ($120.65) costs and disbursements in this cause in this Court, and that execution may be issued for the enforcement thereof.

Dated and signed June 5 A. D. 1914.

By the Court.

Attest:

I. A. CASWELL, *Clerk.*

Statement for Judgment.

Statutory Costs $25.00; Printer $77.40; Clerk $13.00; Acknowledgements $25; Return $5.00; Postage and Express $—; Filing Mandate $—.

Total $120.65.

176 STATE OF MINNESOTA,
Supreme Court, ss:

I, I. A. Caswell, Clerk of said Supreme Court do hereby certify that the foregoing is a full and true copy of the Entry of Judgment in the cause therein entitled, as appears from the original remaining of record in my office; that I have carefully compared the within copy with said original and that the same is a correct transcript therefrom.

Witness my hand and seal of said Supreme Court at the Capitol, in the city of St. Paul, June 5, A. D. 1914.

[Seal of the Supreme Court, State of Minnesota.]

I. A. CASWELL, *Clerk.*

State of Minnesota, Supreme Court. Transcript of Judgment. Filed June 5, A. D. 1914. I. A. Caswell, Clerk.

177 No. 18466. State of Minnesota, Supreme Court. J. H. Wiles, Administrator, Appellant, vs. Great Northern Railway Co., Respondent. Judgment Roll. Filed June 5, 1914. I. A. Caswell, Clerk.

178 *Authentication of Record.*

STATE OF MINNESOTA,
Supreme Court, ss:

I, I. A. Caswell, clerk of the said court, do hereby certify that the foregoing is a true, full and complete transcript of the record and proceedings in the case of J. H. Wiles, as administrator of the estate of Dennis E. Wiles, deceased, Appellant, vs. Great Northern Railway Company, a corporation, Respondent, and also of the opinion of the court rendered therein, of the petition for rehearing and the order denying the same, as the same now appear of record and on file in my office.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said court at my office, in St. Paul, Minnesota, this June 24, 1914.

[Seal of the Supreme Court, State of Minnesota.]

I. A. CASWELL,
Clerk Supreme Court of Minnesota.

179 In the Supreme Court of the United States.

GREAT NORTHERN RAILWAY COMPANY, Plaintiff in Error,
vs.
J. H. WILES, as Administrator of the Estate of Dennis E. Wiles, Deceased, Defendant in Error.

Assignments of Error.

Comes now the Great Northern Railway Company, plaintiff in rror in the above entitled cause, and avers and shows that in the ecord and proceedings in said cause the Supreme Court of the tate of Minnesota erred to the grievous injury and wrong of the laintiff in error herein, and to the prejudice and against the rights f the plaitniff in error, in the following particulars, to-wit:

1. The said Supreme Court erred in reversing the judgment of he District Court in favor of the plaintiff in error and in directing dgment to be entered upon the verdict in favor of defendant in ror.

2. The said Supreme Court erred in holding that plaintiff in ror is liable under the Federal Employers' Liability Act for the ath of the decedent, notwithstanding the absence of any evidence nding to show negligence on the part of plaintiff in error.

3. The said Supreme Court erred in holding that plaintiff in ror is liable for the death of the decedent under the doctrine of ipsa loquitur.

4. The said Supreme Court erred in holding that the defendant in error is entitled to recover damages for the death of the decedent under the Federal Employers' Liability Act, notwithstanding his admitted negligence in disobeying the rules of his employer
180 which required him to protect the rear end of his train.

5. The said Supreme Court erred in holding that the negligence of the decedent in disobeying the rules of his employer requiring him to protect the rear end of his train was not the sole proximate cause of the collision which caused his death, and in holding that the breaking in two of his train previous to the collision was a proximate and contributing cause of said collision and death.

6. The said Supreme Court erred in holding that upon the undisputed facts of this case the provision of the Federal Employers' Liability Act with regard to comparative negligence was applicable.

7. The said Supreme Court erred in holding that it was a question of fact for the jury under the Federal Employers' Liability Act whether the negligence of the deceased was the sole proximate cause or, with the negligence of the defendant, a concurring cause, making applicable the comparative negligence rule of the Federal Act.

Wherefore, for these and other manifest errors appearing in the record, the said Great Northern Railway Company, plaintiff in error, prays that the judgment of the said Supreme Court of the state of Minnesota be reversed and set aside and held for naught, and that judgment be rendered for plaintiff in error granting it its rights under the statutes of the United States, and plaintiff in error also prays for judgment for its costs.

E. C. LINDLEY,
Attorney for Great Northern Railway Company, Plaintiff in Error.

180½ [Endorsed.] Filed Jun- 15, 1914. I. A. Caswell, Clerk.

181 In the Supreme Court of the State of Minnesota.

J. H. WILES, as Administrator of the Estate of Dennis E. Wiles, Deceased, Appellant,

vs.

GREAT NORTHERN RAILWAY COMPANY, Respondent.

To the Honorable Justices of the Supreme Court of the State of Minnesota:

Your Petitioner, the above named Great Northern Railway Company, respectfully shows that on the fifth day of June, 1914, the Supreme Court of the State of Minnesota rendered a final judgment against your Petitioner in a certain case wherein your Petitioner was Defendant, and J. H. Wiles, as administrator of the estate of Dennis E. Wiles, deceased, was Plaintiff, as will appear by reference to the record and proceedings in said case, and that the said court is the highest court of law or equity in said state in which a decision in

said suit could be had; that by the said suit there was drawn in question the construction of certain statutes of the United States relating to the liability of common carriers by railroad to their employes engaged in commerce between any of the several states or territories, and the decision of this court is against the right claimed by the said Great Northern Railway Company, Respondent, and as it believes, contrary to the statutes of the United States relating to the liability of common carriers by railroad to their employes engaged in interstate commerce, and against the right of the said Great Northern Railway Company thereunder, all of which will
182 more fully appear in detail from the assignment of errors filed herein.

Wherefore, the said Great Northern Railway Company prays that a writ of error may issue to the Supreme Court of the State of Minnesota for the correcting of the error complained of, and that a duly authenticated transcript of the record, proceedings and papers therein may be sent to the United States Supreme Court.

GREAT NORTHERN RAILWAY COMPANY,
By E. C. LINDLEY, *Attorney for Respondent.*

182½ [Endorsed:] Filed Jun- 15, 1914. I. A. Caswell, Clerk.

183 In the Supreme Court of the State of Minnesota.

J. H. WILES, as Administrator of the Estate of Dennis E. Wiles, Deceased, Appellant,
vs.
GREAT NORTHERN RAILWAY COMPANY, Respondent.

Comes now the Great Northern Railway Company, the Respondent above named, on this 11th day of June, 1914, and files and presents to this Court its petition praying for the allowance of a writ of error intended to be urged by it, and praying further that the duly authenticated transcript of the record, proceedings and papers upon which the judgment herein was rendered may be sent to the Supreme Court of the United States, and that such other and further proceedings may be had in the premises as may be just and proper; and upon consideration of the said petition, this Court desiring to give petitioner an opportunity to test in the Supreme Court of the United States the question herein presented,

It is ordered by this Court that a writ of error be allowed as prayed, provided however, that the said Great Northern Railway Company, Respondent, give bond according to law in the sum of One Thousand Five Hundred Dollars ($1,500.00), which bond shall operate as a supersedeas bond.

In Testimony Whereof, Witness my hand this 11th day of June, 1914.

CALVIN L. BROWN,
Chief Justice of the Supreme Court of the State of Minnesota.

183½ [Endorsed:] Filed Jun- 15, 1914. I. A. Caswell, Clerk.

184 Know all men by these presents, that we, Great Northern Railway Company, a corporation organized and existing under the laws of the State of Minnesota, as principal, and National Surety Company, a corporation of the State of New York, as surety, are held and firmly bound unto J. H. Wiles, as administrater of the estate of Dennis E. Wiles, deceased, in the sum of One Thousand Five Hundred Dollars ($1,500.00) to be paid to the said obligee, his heirs, representatives and assigns, for the payment of which well and truly to be made we bind ourselves, our successors and assigns, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 11th day of June, 1914.

Whereas, lately in the Supreme Court of the State of Minnesota, in a suit pending in said Court wherein J. H. Wiles, as administrator of the estate of Dennis E. Wiles, deceased, was plaintiff and Great Northern Railway Company was defendant, judgment was entered against the said defendant, and said defendant seeks to prosecute its writ of error in the Supreme Court of the United States to reverse the judgment rendered in the said suit,

Now therefore, the condition of this obligation is such that if the above named defendant, Great Northern Railway Company, shall prosecute its said writ of error to effect and pay all costs and damages, if it shall fail to make good its plea, then this obligation to be void, otherwise to remain in full force and effect.

GREAT NORTHERN RAILWAY COMPANY,
By R. A. JACKSON, *Vice-President.* [CORP. SEAL.]

LEWIS D. NEWMAN.
THOS. G. HURLEY.

Attest:
L. E. KATZENBACH, *Secretary.*

NATIONAL SURETY COMPANY,
By W. S. McCURDY, [CORP. SEAL.]
Its Attorney in Fact.

EVAR CEDARLEAF.
G. E. JOHNSON.

185 STATE OF MINNESOTA,
County of Ramsey, ss:

On this 11th day of June, 1914, before me appeared R. A. Jackson, to me personally known, who, being by me duly sworn, did say that he is the Vice President of the Great Northern Railway Company; that the seal affixed to the foregoing instrument is the corporate seal of said corporation, and that said instrument was executed on behalf of said corporation by authority of its Board of Directors; and said R. A. Jackson acknowledged said instrument to be the free act and deed of said corporation.

[NOTARIAL SEAL.] THOS. G. HURLEY,
Notary Public in and for the State of Minnesota, County of Ramsey.

My commission expires January 10th, 1920.

186 STATE OF MINNESOTA,
County of Ramsey, ss:

On this 11th day of June, 1914, before me appeared W. S. McCurdy, to me personally known, who, being by me duly sworn, did say that he is the Attorney in Fact of the National Surety Company; that the seal affixed to the foregoing instrument is the corporate seal of aforesaid corporation, and that said instrument was executed on behalf of said corporation by authority of its board of directors, and said W. S. McCurdy acknowledged said instrument to be the free act and deed of said corporation.

[NOTARIAL SEAL.] EVAR CEDARLEAF,
Notary Public in and for the State of Minnesota, County of Ramsey.

My commission expires —— 2nd, 1920.

The within bond is this 11th day of June, 1914, approved.
CALVIN L. BROWN,
Chief Justice of the Supreme Court of the State of Minnesota.

(Endorsed:) Filed June 15, 1914. I. A. Caswell, Clerk.

187 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable the Justices of the Supreme Court of the State of Minnesota, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the Supreme Court of the State of Minnesota, before you, or some of you, being the highest court of law or equity of the said state, in which a decision could be had in the said suit between J. H. Wiles, as administrator of the estate of Dennis E. Wiles, deceased, Plaintiff and Appellant, and the Great Northern Railway Company, Defendant and Respondent, wherein, was drawn in question the construction of a clause of the constitution or statute of the United States, and the decision was against the right or privilege specially set up or claimed under the said clause of the constitution or statute, a manifest error hath happened, to the great damage of the said Great Northern Railway Company as by its complaint appears. We being willing that error, if any hath been, shall be duly corrected, and full and speedy justice done to the parties aforesaid, in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this return, so that you have the same in the said Supreme Court at Washington, within thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Edward D. White, Chief Justice of th
United States this 11th day of June, in the year of our Lord, O
Thousand Nine Hundred and Fourteen.

Done in the City of St. Paul, County of Ramsey, State
188 Minnesota, with the seal of the District Court of the Unit
States for the District of Minnesota attached.

[Seal U. S. Dist. Court, Dist. of Minnesota, Third Division.]

CHARLES L. SPENCER,
Clerk of the District Court of the United States
for the District of Minnesota.
By MARGARET L. MULLANE,
Deputy Clerk.

Allowed by:
CALVIN L. BROWN,
Chief Justice of the Supreme Court
of the State of Minnesota.

188½ [Endorsed:] Filed Jun- 15, 1914. I. A. Caswell, Clerk

189 *Certificate of Lodgment.*

SUPREME COURT,
State of Minnesota, ss:

I, I. A. Caswell, clerk of said court, do hereby certify that there was lodged with me as such clerk on June 15, 1914, in the matter of J. H. Wiles, as administrator of the estate of Dennis E. Wiles, deceased, vs. Great Northern Railway Company, a corporation, the original bond of which a copy is herein set forth, and copies of the writ of error, one for the plaintiff and one to file in my office.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said court at my office in St. Paul, Minnesota, this 24th day of June, 1914.

[Seal of the Supreme Court, State of Minnesota.]

I. A. CASWELL,
Clerk Supreme Court of Minnesota.

190 STATE OF MINNESOTA,
County of Hennepin, ss:

H. C. Mackall being first duly sworn deposes and says that on the 15th day of June 1914, in the City of Minneapolis, Hennepin County, Minnesota, he served the attached citation upon Thomas D. Schall personally by handing to and leaving with him a true and correct copy thereof in his office at Number 550 Security Bank Building, in the City of Minneapolis, County of Hennepin, and State of Minnesota; further affiant saith not.

H. C. MACKALL.

Subscribed and sworn to before me this 15th day of June 1914.

[Notarial Seal, Hennepin Co., Minn.]

SARA H. CLOUGH,
Notary Public, Hennepin County, Minnesota.

My Commission expires Mar. 26, 1917.

191 UNITED STATES OF AMERICA, *ss:*

The President of the United States to J. H. Wiles, as Administrator of the Estate of Dennis E. Wiles, Deceased, Greeting:

You are hereby cited and admonished to be and appear at and before the Supreme Court of the United States, at Washington, D. C. within thirty (30) days from the date hereof, pursuant to a writ of error filed in the office of the Clerk of the Supreme Court of the State of Minnesota, wherein the Great Northern Railway Company is Plaintiff in Error, and you are Defendant in Error, to show cause, if any there be, why the judgment rendered against the said Plaintiff in Error as in said Writ of Error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Calvin L. Brown, Chief Justice of the Supreme Court of the State of Minnesota this 11th day of June, 1914.

CALVIN L. BROWN,
Chief Justice of the Supreme Court of the State of Minnesota.

Due and personal service of the foregoing citation is hereby admitted this — day of June, 1914 at Minneapolis, Minnesota.

Attorney for said Defendant in Error, J. H. Wiles, as Administrator of the Estate of Dennis E. Wiles, Deceased.

191½ [Endorsed:] Filed Jun- 15, 1914. I. A. Caswell, Clerk.

192 In the Supreme Court of the United States, October Term, 1914.

GREAT NORTHERN RAILWAY COMPANY, Plaintiff in Error,
vs.
J. H. WILES, as Administrator of the Estate of Dennis E. Wiles, Deceased, Defendant in Error.

Præcipe for Return of Record.

To the Clerk of the Supreme Court of the State of Minnesota:

In making your return to the Supreme Court of the United States in the above entitled cause, you will please include the entire record as returned to said Supreme Court in the appeal to said court from

the District Court, and including the decision of said Supreme Cour and the record of all proceedings therein in said Supreme Court o Minnesota.

Dated June 17, 1914.

E. C. LINDLEY,
M. G. C.,
Attorney for said Plaintiff in Error.

Due service of the above precipe by true copy thereof is hereby admitted at Minneapolis, Minnesota this — day of June, 1914.

———— ————,
Attorney for said Defendant in Error.

193 STATE OF MINNESOTA,
County of Hennepin, ss:

H. C. Mackall being first duly sworn deposes and says that in the City of Minneapolis, County of Hennepin, State of Minnesota, on the 19th day of June 1914, he served the within præcipe for return of record upon Thomas D. Schall, attorney for said defendant in error, personally by handing to and leaving with him a true and correct copy thereof. Further affiant saith not.

H. C. MACKALL.

Subscribed and sworn to before me this 20" day of June 1914.

[Notarial Seal, Hennepin Co., Minn.]

SARA H. CLOUGH,
Notary Public, Hennepin County, Minnesota.

My commission expires Mar. 26, 1917.

193½ [Endorsed:] Filed Jun- 20, 1914. I. A. Caswell, Clerk.

194 *Return to Writ.*

UNITED STATES OF AMERICA,
Supreme Court of Minnesota, ss:

In obedience to the commands of the within Writ, I herewith transmit to the Supreme Court of the United States a duly certified transcript of the complete record and proceedings in the within entitled case, with all things concerning the same.

In Witness Whereof, I hereunto subscribe my name and affix the seal of said Supreme Court of Minnesota, in the city of St. Paul, Minnesota, this June 24, 1914.

[Seal of the Supreme Court, State of Minnesota.]

I. A. CASWELL,
Clerk Supreme Court of Minnesota.

Endorsed on cover: File No. 24,301. Minnesota Supreme Court. Term No. 196. Great Northern Railway Company, plaintiff in error, vs. J. H. Wiles, as administrator of the estate of Dennis E. Wiles, deceased. Filed July 7, 1914. File No. 24,301.

Supreme Court of the United States.

OCTOBER TERM, 1915.

No. 196.

GREAT NORTHERN RAILWAY COMPANY,
Plaintiff in Error,

vs.

J. H. WILES, AS ADMINISTRATOR OF THE ESTATE OF DENNIS E. WILES, DECEASED,
Defendant in Error.

In Error to the Supreme Court of the State of Minnesota.

BRIEF FOR PLAINTIFF IN ERROR.

E. C. LINDLEY,
Attorney for Plaintiff in Error.

M. L. COUNTRYMAN,
Of Counsel.

St. Paul, Minn.

Supreme Court of the United States.

OCTOBER TERM, 1915.

No. 196.

GREAT NORTHERN RAILWAY COMPANY,
Plaintiff in Error,

vs.

J. H. WILES, AS ADMINISTRATOR OF THE ESTATE OF DENNIS E. WILES, DECEASED,
Defendant in Error.

In Error to the Supreme Court of the State of Minnesota.

BRIEF FOR PLAINTIFF IN ERROR.

STATEMENT OF FACTS.

This action was brought under the Federal Employers' Liability Act, to recover damages in the sum of Fifty Thousand Dollars ($50,000.00) for the alleged wrongful death of plaintiff's decedent Dennis E. Wiles, who at the time of his death was employed by defendant as a freight brakeman. A verdict was obtained in the State Court in plaintiff's favor in the sum of Six Hundred Fifty Dollars

($650.00). Upon defendant's motion the trial court set aside the verdict and entered judgment in defendant's favor notwithstanding the verdict. From the judgment so entered Plaintiff appealed to the State Supreme Court, where the judgment appealed from was reversed, the verdict reinstated and entry of judgment ordered thereon. (125 Minn. Rep. 348.) The case comes to this court by writ of error.

There is no dispute as to any material fact. Deceased, at the time of his death, was employed by plaintiff in error, herein called the company, as a freight train brakeman. His position was in the caboose in the rear of his train, and his most important duty was to protect the rear end of the train by "flagging," including the use of track torpedoes and fuses. He was governed by the company's rule 99, as follows: "When a train stops or is delayed by any circumstances under which it may be overtaken by another train, the flagman must go back immediately with stop signals a sufficient distance to insure full protection. When recalled he may return to his train, first placing two torpedoes on the rails, six rail lengths apart, or a lighted fusee in the center of the track when conditions require it." Deceased was an experienced brakeman and had been frequently examined as to his familiarity with the duties of a flagman. His knowledge of rule 99 is not denied.

The train upon which deceased was employed was an extra freight train operated by train orders. It was inferior to, and had to keep out of the way of, all time card scheduled trains, both freight and passenger. It was running at night, in an easterly direction, and upon arrival at the station of Grotto there was barely sufficient time

for it to proceed to the next station of Skykomish, five miles east, and there get into clear, i. e., take the side track, to allow east bound passenger train # 44 to pass at that station. Train # 44 was a regular time card train, the schedule time of which was well known to the crew of the extra freight train. The track between Grotto and Skykomish was wet and slippery that night, in consequence of which the extra freight train was unable to make good time. When about four miles from Grotto and one mile from Skykomish the freight train broke in two, that is, a drawbar was pulled out of the sixth car from the engine, which caused the rear portion of the train, consisting of about 40 cars, to separate from the front portion, leaving a space of about 20 feet at the point of the break. The rear portion was then brought to a stop by the automatic application of the air brakes. The engineer, realizing that his train had broken in two, immediately gave a signal by one long and three short blasts of the whistle, which was a signal to the rear brakeman to go back and protect the rear end of the train. The head brakeman, riding on the engine, got off and walked back, found the place where the break occurred, and started toward the caboose to get another drawbar to replace the one which had pulled out. When he had gone about half way to the caboose, and from 3 to 5 minutes after the break occurred, the engine of passenger train # 44 crashed into the caboose of the freight train, killing the conductor and the rear brakeman, both of whom were in the caboose. The collision occurred on a curve, which prevented the engineer of the passenger train from seeing the freight train until he was almost upon it. No warning or signal of any kind had been given him of the presence of the freight train.

Deceased had not performed his duty in that respect. Instead of going back along the track to warn the approaching passenger train by flag, fusee and torpedoes, he had remained in the caboose during all the time, probably 5 minutes, that had elapsed between the pulling out of the drawbar and the arrival of the passenger train. All the facts and circumstances show conclusively that the collision, and his own death, resulted directly from deceased's failure to obey the command of his engineer communicated to him by the long and short blasts of the whistle, and his disregard of the imperative command of rule 99 that he protect the rear end of his train. It was not denied that if he had obeyed the rule and the engineer's signal with reasonable promptness he could and would have gone back far enough to signal the approaching passenger train in ample time to prevent the collision. No excuse was shown for his fatal disobedience.

It was contended by plaintiff in the State Court that the sole proximate cause of the death of plaintiff's decedent was the pulling out of the drawbar, and that his admitted failure to perform his duty and thereby prevent the collision was at most but a concurring or contributing cause. It was further contended that proof of the mere fact that a drawbar pulled out, without any evidence that this occurred as the result of a defect which could have been discovered by proper inspection, or that the company had been guilty of negligence in any respect, was sufficient to establish a prima facie case of liability under the Federal Employers' Liability Act. Both of these contentions were sustained by the State Supreme Court, reversing the trial court which had rendered judgment for defendant notwithstanding the verdict.

ASSIGNMENTS OF ERROR.

1. The Supreme Court of Minnesota erred in reversing the judgment of the District Court in favor of the plaintiff in error and in directing judgment to be entered upon the verdict in favor of defendant in error.

2. The said Supreme Court erred in holding that plaintiff in error is liable under the Federal Employers' Liability Act for the death of the decedent, notwithstanding the absence of any evidence tending to show negligence on the part of plaintiff in error.

3. The said Supreme Court erred in holding that plaintiff in error is liable for the death of the decedent under the doctrine of res ipsa loquitur.

4. The said Supreme Court erred in holding that the defendant in error is entitled to recover damages for the death of the decedent under the Federal Employers' Liability Act, notwithstanding his admitted negligence in disobeying the rules of his employer which required him to protect the rear end of his train.

5. The said Supreme Court erred in holding that the negligence of the decedent in disobeying the rules of his employer requiring him to protect the rear end of his train was not the sole proximate cause of the collision which caused his death, and in holding that the breaking in two of his train previous to the collision was a proximate and contributing cause of said collision and death.

6. The said Supreme Court erred in holding that upon the undisputed facts of this case the provision of the Federal Employers' Liability Act with regard to comparative negligence was applicable.

7. The said Supreme Court erred in holding that it was a question of fact for the jury under the Federal Employers' Liability Act whether the negligence of the deceased was the sole proximate cause or, with the negligence of the defendant, a concurring cause, making applicable the comparative negligence rule of the Federal Act

ARGUMENT.

I.

THE UNDISPUTED FACTS SHOW THAT THE SOLE PROXIMATE CAUSE OF THE COLLISION AND THE DEATH OF PLAINTIFF'S DECEDENT WAS HIS FAILURE TO PERFORM HIS DUTY AS A FLAGMAN. THE PULLING OUT OF A DRAWBAR AND THE STOPPING OF THE TRAIN CAUSED THEREBY, MERELY CREATED A CONDITION OUT OF WHICH AROSE HIS DUTY TO ACT.

The trial court, in granting the company's motion for judgment notwithstanding the verdict, held as a matter of law that the failure of the deceased to protect the rear end of the freight train was the sole proximate cause of his death. The court said:

> "It may be, as suggested by plaintiff's counsel, that defendant's negligence as to the breaking in two of the freight train should be presumed, but it was not this occurrence that caused the death of Mr. Wiles; it was his failure, unexplained and unexcused by the evidence, to immediately go back and signal the passenger train, which proximately caused his death." (Record, p. 71.)

The State Supreme Court, however, held that it was for the jury to say whether deceased's admitted negligence and disobedience was the sole, or merely a contributing cause. That court said:

> "Conceding that the deceased was negligent, we do not think it follows as a matter of law that this negligence was the sole proximate cause of his death. The question, putting it favorably to the defendant, was for the jury whether the negligence of the deceased, conceding him to have been negligent, was the sole proximate cause, or, wtih the negligence of the

> defendant, a concurring cause, making applicable the comparative negligence rule as to damages. The question of proximate cause is usually one of fact." Record, p. 79.

To support this conclusion the court cites a number of its own previous decisions, also the case of

Milwaukee & St. Paul Ry. Co. v. Kellogg, 94 U. S. 469.

There is nothing in the nature of an issue as to proximate cause, which takes it out of the general rule:

> "That there are times when it is proper for a court to direct a verdict is clear. It is well settled that the court may withdraw a case from them (the jury) altogether, and direct a verdict for the plaintiff or the defendant, as the one or the other may be proper, where the evidence is undisputed, or is of such conclusive character that the court, in the exercise of a sound judicial discretion, would be compelled to set aside a verdict returned in opposition to it."
>
> Patton v. Texas & Pac. R. Co., 179 U. S. 658;
>
> Phoenix Mut. L. Ins. Co. v. Doster, 106 U. S. 30;
>
> Griggs v. Houston, 104 U. S. 553.

It is of course true that the question of proximate cause is ordinarily for the jury, for the simple reason that the jurors are the triers of the facts, and must determine from all the evidence, not only what the facts are but also their proper relation to each other. In the Kellogg case, supra, this court held that the question whether the defendant was liable for the loss of the plaintiff's mill and lumber set on fire by sparks from the defendant's elevator which had been set afire by sparks from the defendant's steamboat, was a question of fact, to be submitted to the jury. The only question of law there involved was as to whether the original act of the defendant was too remote to be the

proximate cause of the last fire. But we cannot suppose this court intended to hold that the question of proximate cause is *always* for the jury, even where the facts are clear and undisputed showing an absence of causal relation. On the contrary, the following language of the court in the Kellogg case shows very clearly that there must be in the evidence a substantial basis for a jury's finding of proximate cause.

> "It is admitted that the rule is difficult of application. But it is generally held that, in order to warrant a finding that negligence or an act not amounting to wanton wrong, is the proximate cause of an injury, it must appear that the injury was the natural and probable consequence of the negligent or wrongful act, and that it ought to have been foreseen in the light of the attending circumstances."

This language was quoted with approval in

Scheffer v. Washington, etc., Ry. Co., 105 U. S. 249.

In that case this court held as a matter of law, the facts being undisputed, that where a person was so injured in a railroad collision that he subsequently became mentally deranged and committed suicide, the proximate cause of his death was his own act, and not the negligent act of the railroad company whereby he was injured. Upon these undisputed facts there was nothing for a jury to decide, and judgment was rendered for the defendant upon demurrer to the declaration.

In Hayes v. Michigan C. R. Co., 111 U. S. 228, the court said that the question of proximate cause "is a question of fact, *unless the causal connection is evidently not proximate.*" (Italics ours.)

In Louisiana Mut. Ins. Co. v. Tweed, 74 U. S. 7, Wall. 44, it was said by Mr. Justice Miller, that

> "one of the most valuable of all the criteria furnished us by the authorities is to ascertain whether any new cause has intervened between the fact accomplished and the alleged cause. If a new force or power has intervened of itself sufficient to stand as the cause of the misfortune, the other must be considered as too remote."

Quoted with approval in

Washington & G. R. Co. v. Hickey, 166 U. S. 521.

In Memphis & Charleston R. Co. v. Reeves, 77 U. S. 10 Wall. 176, it was held that a carrier is not liable for the loss of goods by act of God, although he had contracted to start the transportation of the goods before he did, and if he had done so the goods would have escaped injury; that the failure of the carrier to comply with such contract would have been only the remote cause of the loss, the act of God being the immediate and proximate cause.

It is respectfully submitted that where, as in the present case, all the material facts and circumstances are undisputed, the question of proximate cause must ordinarily be determined by the court as a matter of law. If the causal connection is evidently not proximate, the jury must be so instructed as a matter of law. Such is, in fact, the settled doctrine of the Minnesota Supreme Court, in cases arising under state laws and under the common law.

Fezler v. William & S. F. R. Co., 85 Minn. 252.
Schreiner v. Great Northern R. Co., 86 Minn. 245.
Ellington v. Great Northern R. Co., 96 Minn. 176.
Mehalek v. Minneapolis, etc., Ry. Co., 105 Minn. 128.

Nelson v. Chicago, M. & St. P. R. Co., 30 Minn. 74.
Groff v. Duluth Imperial Mill Co., 58 Minn. 333.
Johanson v. Howells, 55 Minn. 61.
Weisel v. Eastern Ry. Co., 79 Minn. 245.

In all of the foregoing cases, as well as in a great number of others that might be cited, the Minnesota court has decided as a matter of law that the defendant's original act was not the proximate cause of the damage complained of, and that there was no question for a jury to decide.

In the case at bar, no recovery could be had in the State Court if the action had been brought either at common law or under local statutes, it being conceded by the court that plaintiff's decedent was guilty of negligence which contributed to cause the collision. It would therefore be immaterial, in such an action, whether the question of proximate cause involved in the pulling out of the draw-bar was for the jury or for the court. The admitted negligence of the deceased would in either case be an absolute bar to recovery.

To avoid this result, the State Court was driven to the necessity of holding that upon the undisputed facts a case of concurring negligence existed calling for the application of the rule of comparative negligence under the Federal Employers' Liability Act. The State Court seems to have held, in other words, that under a proper construction of the Federal Act, the negligence of an employe injured in interstate commerce, although it immediately and directly caused his injury, does not entirely prevent recovery where there appears to have been an earlier act of negligence on the part of the employer creating a condition or situation which furnished the occasion for the injured

employe's negligence. We quote from the language of the opinion. (Transcript, p. 79):

> "Both trains were engaged in interstate commerce. If the injury resulted from the concurring negligence of the deceased in failing to warn the approaching train, and of the railway company in failing to furnish a proper appliance in the way of a drawbar, the doctrine of comparative negligence is applicable under the Federal Employers' Liability Act (Citing cases). The court submitted the question of comparative negligence to the jury. The judgment notwithstanding the verdict was granted upon the theory that the deceased was negligent and that his negligence was the proximate cause of the injury and that it could not be found that the case was one of the concurring negligence of the deceased and of the railway company. Assuming, without deciding, that the deceased was negligent as a matter of law, we do not think the result stated follows. The claim is that the deceased should have thrown out fusees to warn the approaching passenger train, and that when the freight train stopped, upon its breaking apart, he should have gone back and placed a signal for the approaching passenger train. Conceding that the deceased was negligent, we do not think it follows as a matter of law that his negligence was the sole proximate cause of his death. The question, putting it favorably to the defendant, was for the jury whether the negligence of the deceased, conceding him to have been negligent, was the sole proximate cause, or, with the negligence of the defendant, a concurring cause, making applicable the comparative negligence rule as to damages. The question of proximate cause is usually one of fact. (Citing cases.) It is always to be determined on the facts of each case upon mixed considerations of logic, common sense, justice, policy and precedent. * * * The best use that can be made of the authorities on proximate cause is merely to furnish illustrations of situations which judicious men upon careful consideration have adjudged to be upon one side of the line or the other. * * * Under the federal statute contributory negligence reduces damages, but does not prevent a recovery; and we think

the trial court was in error in holding that the sole proximate cause of decedent's death was his negligence."

It will be observed that the State Court does not attempt the difficult task of showing why it concludes that the jury, and not the trial court, should determine the question of proximate cause; or rather, why it concludes that the jury's finding thereon was right and the trial court's wrong. In reaching that conclusion, the previous decisions of the court upon the question of proximate cause seem to have been disregarded.

"Consequences which follow in unbroken sequence, *without an intervening efficient cause*, from the original negligent act, are natural and proximate."

Christianson v. Chic. St. P. M. & O. Ry. Co., 67 Minn. 94.

"The proximate cause of an injury, within the meaning of the law of negligence, is such cause as operates to produce particular consequences *without the intervention of any independent or unforeseen cause or event*, without which the injury could not have occurred—such consequences as might reasonably have been anticipated as likely to occur from the alleged negligent act." (Italics ours.)

Strobeck v. Bren, 93 Minn. 428.

"It has been clearly settled by a long line of decisions that what is meant by proximate cause is not that which is last in time or place, not merely that which was in activity at the consummation of the injury, *but that which is the procuring, efficient and predominant cause.*" (Italics ours.)

Russell v. German F. Ins. Co., 100 Minn. 528.

In Weisel v. Eastern Ry. Co., 79 Minn. 245, it appeared that the plaintiff was injured by the falling of a lump of

coal from the tender of a locomotive, and it was contended that the defendant had negligently overloaded the tender, also that a fellow servant negligently dislodged the lump of coal which struck plaintiff. The court held that the alleged negligence in overloading the tender was not the proximate cause of the injury.

> "It (the tender) had in fact been loaded and had run a considerable distance on the road before the accident, and at the time when plaintiff was hurt was standing perfectly still on defendant's track openly visible to the most casual observer; and the lump of coal had not then fallen, and it seems certain, beyond any doubt, would not have fallen if it had not been directly affected by the movements of Dunn, either alone or in connection with the acts of plaintiff or his fellow servant, who was assisting him on the ground. In either case, the defendant ought not to be required to anticipate that so unusual and peculiar a combination of circumstances would occur as to occasion so extraordinary and unexpected an accident from such a commonplace and ordinarily simple cause; or, in other words, we cannot hold that the overloading of the tender, if it was supplied with an unusual quantity of coal, was the proximate cause of plaintiff's injury, but that, notwithstanding the coal was piled loosely upon the tender, as is usual, the results that happened were brought about by a new and independent cause—the acts of plaintiff's fellow servants—for which defendant would not be responsible."

The present case, we contend, is governed by the general rule of law as stated in a multitude of decisions:

> "If an injury has resulted in consequence of a certain act or omission, *but only through or by means of some intervening cause, from which last cause the injury followed as a direct and immediate consequence*, the law will refer the damage to the last or proximate cause, and refuse to trace it to that which is the more remote." (Italics ours.)
>
> "If the original wrong only becomes injurious in consequence of the intervention of some distinct and

> wrongful act or omission by another, the injury shall be attributed to the last wrong as the proximate cause, and not to that which was the more remote."
>
> Cooley, Torts, 2nd Ed. pp. 73, 76.

If a new force or power intervenes between the negligent act and the injury, sufficient of itself to stand as the cause of the injury, the negligent act must be considered as too remote.

> Louisiana Mut. Ins. Co. v. Tweed, 74 U. S. 7 Wall. 44.
>
> Scheffer v. Washington City R. Co., 105 U. S. 249.
>
> Washington & G. R. Co. v. Hickey, 166 U. S. 521.
>
> See, also, St. Louis & S. F. R. Co. v. Conarty, U. S. Sup. Ct., June 14, 1915.

The pulling apart of the drawbars was not shown to have been caused by any negligent act or omission. It produced no injury to the decedent. Its only effect was to bring the train to a standstill—a situation not unusual or extraordinary in the operation of a loaded freight train. To meet just such situations, and to make proper provision therefor, the decedent was placed on duty in the rear of the train, furnished with a flag, torpedoes and fusees, and charged with the duty of protecting the rear end of his train against the approaching passenger train. He knew that his train might stop at any time; in fact, it was becoming apparent at the very time his train separated and stopped, that it could not reach the siding at Skykomish in time to clear for the passenger train; therefore he *knew* that he must flag that train without delay. It was certain to overtake his train in a few minutes, and he alone was entrusted with the all-important duty of preventing a collision. He did not need the warning

whistle given by his engineer, to remind him of his duty. Granting that he did not know what caused his train to stop when it did, he certainly knew and appreciated the absolute necessity of leaving the shelter of the caboose and going back as far as he could to signal the passenger train to stop. His failure to act as commanded by the rule and by the engineer's signal, was the direct, immediate, efficient and proximate cause of the collision and of his own death. No argument or illustration could make this plainer. Whatever may have been the cause of the pulling out of the drawbar, that occurrence was at most a remote, not a proximate or concurring cause of the accident.

The railroad company might have foreseen that a drawbar would pull out and cause the train to stop, but it could not reasonably have foreseen that the decedent upon the happening of that occurrence, would in disobedience of the rule and the command of the engineer, fail and omit to signal the approaching passenger train. Such failure was not the natural and probable consequence of the original act, but was so unnatural and improbable that no reasonable man ought to have foreseen it. This is the test, as stated by this court in the Kellogg case:

> "In order to warrant a finding that negligence or an act not amounting to wanton wrong is the proximate cause of an injury, it must appear that the injury was the natural and probable consequence of the negligent or wrongful act, *and that it ought to have been foreseen in the light of the attending circumstances.*" (Italics ours.)

Suppose that instead of five minutes, an hour had elapsed before the passenger train collided with the caboose, and that during all that time, with knowledge of the fact that his train had stopped, and of his duty to

flag, he remained in the caboose, making no attempt to protect the rear end of his train. Would any court consider that a proximate or concurring cause of his death was the pulling out of a drawbar an hour previously? There is clearly no distinction in principle between the case supposed and the actual facts.

The deceased had five minutes (ample time) in which to act in view of the situation which to his knowledge was created by the stopping of his train and the approach of the passenger train. If the pulling out of the drawbar was a proximate or concurring cause in this case, it must logically follow that it would continue to be so even though the collision were postponed for hours.

Again, suppose that after the drawbar pulled out the deceased had left the caboose and walked down the track to flag the approaching train, and that while so walking along the track he carelessly fell and broke his neck. Would any court hold that the pulling out of the drawbar was the proximate or concurring cause of his death? We are unable to see any distinction in principle between that case and the one at bar.

It seems to us that the position taken by the State Court in regard to proximate cause and concurring negligence amounts to holding that the Employers' Liability Act makes carriers practically insurers of the safety of their train employes, as to the consequences of their own misconduct, notwithstanding the language of the Act plainly limits and restricts liability to cases of the employer's negligence affirmatively proven and established.

It is respectfully submitted that the Supreme Court of Minnesota erred in holding that the jury were warranted in finding that the proximate cause of the collision was

the pulling out of the drawbar, and that the court should have held, as did the trial court, that decedent's failure to protect his train was the sole proximate cause.

II.

THE EVIDENCE WHOLLY FAILS TO ESTABLISH NEGLIGENCE IN THE PULLING OUT OF THE DRAWBAR. UNDER THE FEDERAL LIABILITY ACT, NEGLIGENCE MUST BE AFFIRMATIVELY PROVEN, AND THE DOCTRINE OF RES IPSA LOQUITUR CANNOT BE INVOKED.

Texas & Pacific R. Co. v. Barrett, 166 U. S. 617.
Patton v. Texas & Pacific R. Co., 179 U. S. 658.
Looney v. Metropolitan R. Co., 200 U. S. 480.
Seaboard Air Line R. Co. v. Moore, 228 U. S. 433.
Southern Ry. v. Bennett, 233 U. S. 80.
Central Vermont R. Co. v. White, U. S. Sup. Ct. June 21, 1915.
Pierce v. Kile, 26 C. C. A. 201.
Bowes v. Hopkins, 28 C. C. A. 524.
Hodges v. Kimball, 44 C. C. A. 193.
Mexican Cent. R. Co. v. Townsend, 52 C. C. A. 369.
O'Connell v. Pennsylvania R. Co., 55 C. C. A. 483.
Mountain Copper Co. v. Van Buren, 59 C. C. A. 229.
Chicago, etc., R. Co. v. O'Brien, 67 C. C. A . 421.
Shandrew v. Chicago, etc., R. Co., 73 C. C. A. 430.
Northern Pac. R. Co. v. Dixon, 139 Fed. 737.
Butler v. Frazee, 25 App. D. C. 392.
Hodges v. Kimball, 44 C. C. A. 193.

"The rule governing the duty of an employer to an employe is essentially different from that governing

> the duty of a railroad to passengers. The argument of plaintiff seems to proceed on the theory that the burden is on the defendant to prove frequent inspections, and rebut a presumption of negligence, but there is no better settled principle than that he who alleges negligence must prove it. It cannot be inferred from an unproved fact. The question is not, as stated, did the absence of the handholds and bumper cause the accident? But was the absence of the bumper and handholds such negligence on the part of the defendant, the proximate cause of the injury, as to render defendant liable in damages?"

As shown by the foregoing decisions, it is and for many years has been the settled rule of the Federal Courts that as between employer and employe the doctrine of *res ipsa loquitur* has no application and cannot be invoked as a substitute for affirmative evidence of negligence. The mere happening of an accident resulting in injury to the employe does not of itself create any presumption of negligence on the part of the employer. As stated by this court in Texas & Pac. R. Co. v. Barrett, 166 U. S. 617:

> "The fact of accident carries with it no presumption of negligence on the part of the employer; and it is an affirmative fact for the injured employe to establish that the employer has been guilty of negligence."

Congress, in enacting the Employers' Liability Act, must have intended that the question of negligence (upon proof of which liability under the Act must rest) should be judicially determined in accordance with the long settled rule in the Federal Courts, wherein *res ipsa loquitur* has no place.

In the recent case of Central Vermont Ry. Co. v. White (June 21, 1915) this Court decided that a state rule as to the burden of proving contributory negligence was not

applicable in an action in the State Court brought under the Employers' Liability Act. The Court said:

> "Congress in passing the Federal Employers' Liability Act evidently intended that the Federal Statute should be construed in the light of these and other decisions of the Federal Courts. Such construction of the Statute was, in effect, approved in Seaboard Air Line v. Moore, 228 U. S. 434. There was, therefore, no error in failing to enforce what the defendant calls the Vermont rule of procedure as to the burden of proof."

The court below apparently took the view that as Congress had granted to the State Courts concurrent jurisdiction to enforce the liability created by the Federal Employers' Liability Act, each State Court is at liberty to dispense with proof of negligence in cases arising under that Act, just as if the liability depended upon the common law or state enactments.

But it is manifest that Congress intended to create a *uniform* rule of liability governing railroad companies in their relation to employes engaged in interstate commerce; a rule working uniformly in all the states and in all the courts, whether State or Federal, wherein the liability created by that Act may be enforced. It is incredible that Congress intended that upon a given state of facts an interstate employer should be held free from liability under the Federal rule, and at the same time, upon the same facts, subject to heavy damages under a contrary rule or presumption prevailing in some of the state courts.

If State Courts are free to apply the doctrine of *res ipsa loquitur* as a substitute for the proof of negligence required by the Liability Act, no railroad company engaged in interstate commerce can possibly determine for itself whether an accident resulting in injury to an employe

creates liability under the Act, as the answer to that question will necessarily depend upon whether the doctrine of *res ipsa* does or does not prevail in the state where the injured employe may elect to bring suit. In the case of the Great Northern, an injured employe has a choice of at least eight different states in which to sue; in a majority of them, including the state where the accident here involved occurred, there is no presumption of negligence such as the Minnesota court has invoked. Neither in the Federal courts nor in the courts of the state where the alleged tort was committed could the company be held guilty of negligence upon the facts here shown. To permit the courts of Minnesota to invoke this presumption of negligence under the Federal Act, especially as to accidents occurring in other states where no such presumption obtains, would not only destroy the uniform measure of responsibility aimed at by Congress, but also involve all interstate railroads in hopeless uncertainty and confusion in the adjustment of claims.

The Minnesota court would not have permitted plaintiff to recover in this case if he had predicated his cause of action upon the common law or upon the state law, for the reason that the deceased was admittedly guilty of negligence directly contributing to cause his death; such negligence being an absolute bar. What the Minnesota court has undertaken to do in this case is to apply *to a claim arising solely under the Federal Act* a presumption of negligence inapplicable and worthless outside of that Act, and rejected by all Federal courts where that Act is sought to be enforced.

The reasoning of the Minnesota court in arriving at this unjust result has been rejected time and again by the Federal courts. It assumes that:

> "Unless the rule of res ipsa loquitur applies the substantial result is that one, however innocently injured through the pulling out of a defective drawbar, or the representatives of one killed, cannot successfully maintain an action (*under the Federal Act*) for the injury or death because of his inability to obtain evidence of the precise defect. The application of the doctrine is in aid of the fair administration of justice and is not unjust to the defendant." (Clause in italics ours.)

Earlier in its opinion the court had frankly admitted that in the present case there was no evidence whatever of the existence of any defect, so that its solicitude to prevent injustice on that score seems uncalled for:

> "What caused the pulling out of the drawbar is not shown. *There is no direct proof that it was defective or that the defendant was negligent in the care or use of it.* The plaintiff relies upon the doctrine of res ipsa loquitur *in proof of negligence.*" (Italics ours.)

We respectfully submit that there can be no recovery in a State Court in an action brought under the Federal Act, to recover damages for injuries claimed to have resulted from the pulling out of a drawbar; where the evidence wholly fails, as in this case, to show that the drawbar was defective, or that there was any failure to inspect, or that the train was improperly handled; and that this conclusion cannot be ignored by a State Court upon the

ground that it works hardship to an injured employe or his family.

Respectfully submitted.

E. C. LINDLEY,
Attorney for Plaintiff in Error.

M. L. COUNTRYMAN,
Of Counsel.

St. Paul, Minn.

SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM, 1915.

No. 196.

GREAT NORTHERN RAILWAY COMPANY,
Plaintiff in Error,

vs.

J. H. WILES, as administrator of the Estate of DENNIS E. WILES, Deceased.
Defendant in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

BRIEF FOR DEFENDANT IN ERROR.

W. R. DUXBURY,
Attorney for Defendant in Error,
St. Paul, Minnesota.

LYLE PETTIJOHN,
Of Counsel.

THE PIONEER COMPANY, ST. PAUL

SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM, 1915.

No. 196.

GREAT NORTHERN RAILWAY COMPANY,
Plaintiff in Error,

vs.

J. H. WILES, as administrator of the Estate of DENNIS E. WILES, Deceased.
Defendant in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

BRIEF FOR DEFENDANT IN ERROR.

STATEMENT OF FACTS.

The statement of facts in the brief of plaintiff in error contains practically all the facts which are material. It is however misleading as to the time which elapsed between the breaking in two and the collision. The only witness as to that feature, testified (F. 44-5, Record).

"Q. How long after your train broke in two before you were cognizant of the fact?

A. How long, just as soon as it broke in two, because it stopped the train, something was wrong.

Q. Did you get off the train immediately?

A. Yes, sir.

Q. How far did you walk before the accident occurred?

A. I ran from the engine to where the break in two was.

Q. How long did that take you?

A. I should judge ten to fifteen seconds.

Q. What period of time elapsed between the time that you arrived at the break in two and the collision?

A. I dont remember just how long it was.

Q. Can you state approximately within ten or fifteen minutes how long it was?

A. I should judge from the time of the break in two, just giving a rough estimate, I suppose between three to five minutes."

No other members of the train crew were called as witnesses. This witness was going to the caboose to get a chain to "chain up a car with" because "a draw bar was out of the car" (F. 42-3 Record) not to get another draw bar to replace the one pulled out as plaintiff claims (P. 3, Brief).

The rules of the railroad company and the custom in vogue permitted the extra freight on which deceased was employed to run so close to the passenger, No. 44, that if the extra freight "had time to clear Grotto and make Skykomish before No. 44 was due out of Grotto we had a perfect right to go to Skykomish," (F. 50, Record). Schedule trains were given no notice of extras being ahead of them

excepting through orders (F. 38, R.) and no orders were given the engineer on No. 44 this night.

ARGUMENT.

The time which elapsed between the breaking in two and the collision was at most, very short. The two were practically instantaneous so far as affording deceased time in which to collect the necessary paraphernalia and depart towards the rear was concerned. The conductor who was deceased's superior officer and the agent of defendant in charge of the train was in the caboose with deceased. If it appeared or was necessary for the deceased to flag, his superior officer neglected to see that this duty was performed.

The opinion of the Minnesota Supreme Court, 125 Minn. 348, 147 N. W. 427, (F. 143-150, Record) summarizes the questions presented here as follows:

> (1) Whether the doctrine of res ipsa loquitur applies to an employe situated as deceased was.
>
> (2) Whether the doctrine is applicable when the injury occurs through the pulling out of a draw-bar on a freight train.
>
> (3) Whether the negligence of the deceased, assuming him to have been negligent, was the sole proximate cause of his death.

and discusses and determines those questions contrary to the contentions of plaintiff in error.

To that opinion might be added that the provisions of the Safety Appliance Acts requiring that such cars be equipped with couplers which will

couple automatically by impact without the necessity of men going between the ends of cars was violated. Here the draw bar pulled out and a chain was to be used. Certainly that coupler at that time was defective within the prohibition of the Safety Appliance Acts. Plaintiff in error was given the benefit of the court's charge as to comparative negligence to which it was not entitled.

That portion of the brief of plaintiff in error, pages 7 to 18, which is devoted to a discussion of the alleged contributory negligence of defendant in error is labeled as a discussion of the question of proximate cause and is merely a summary of a few elementary principles of negligence law. It fails to show that there was no substantial evidence to be submitted to the jury but on the contrary asserts that the jury decided erroneously the questions of fact which were submitted.

> "While the contentions, from an ultimate point of view, present a question of law—that is, Was there any substantial evidence to go to the jury?—in their primary aspect they call for an examination of the entire evidence to determine whether it had any substantial tendency to establish the right of the plaintiff to recover. * * *
>
> * * * we do not think we are called upon to scrutinize the whole record for the purpose of discovering whether it may not be possible, by a minute analysis of the evidence, to draw therefrom inferences which may possibly conflict with the conclusion of the courts below as to the tendencies of the proof. * * *"
>
> Chicago, Etc., Ry. Co. v. King, 222 U. S. 222, 32 Sup. Ct. Rep. 79, 80.

SECOND.

The numerous citations on page 18 of the brief of plaintiff in error are not in point. The holding of the cases there cited is uniformly that negligence cannot be inferred from the mere happening of an accident. In exceptional situations the doctrine of res ipsa loquitur applies, the limits of its application being, as stated in 4 Wigmore Sec. 2509:

> "(1) The apparatus must be such that in the ordinary instance no injurious operation is to be expected unless from a careless construction, inspection or user.
>
> (2) Both inspection and user must have been at the time of the injury in the control of the party charged.
>
> (3) The injurious occurrence or condition must have happened irrespective of any voluntary action at the time by the party injured."

The decisions of the Federal Courts of later date than those upon which plaintiff in error relies show that the application of that doctrine (res ipsa loquitur) depends upon and is determined by the circumstances and that, the circumstances warranting, it applies as well in cases between employer and employe as in other relations.

> "* * * there is no hard and fast rule that the doctrine of res ipsa loquitur can in no case be applicable in a suit by an employe against an employer for negligent injuries. On the contrary, the rule referred to has been applied in numerous cases of that nature, the application of the rule being determined by the circumstances under which the accident is shown to have happened."

Byers v. Carnegie Steel Co., 159 Fed. 347, 86 C. C. A. 347, 16 L. R. A. n s 214.

See also,

Lucid v. Du Pont Powder Co., 199 Fed. 377, 118 C. C. A. 61.

The cases which plaintiff in error cites do not bear out its contentions. Almost without exception they hold that "If the circumstances surrounding the transaction speak the negligence of the master, and that can be deduced therefrom as a natural and reasonable inference, the duty of explanation is cast upon the master" and that after such explanation has been given or made the result and conclusion is what the jury may reasonably draw from the evidence as a whole.

This court, in the recent case of Southern Ry. Co. v. Bennett, 233 U. S. 80, in passing upon an instruction given the jury as to the burden of proof being upon plaintiff and as to a statement of what would constitute prima facie negligence recognized the applicability of the doctrine of res ipsa loquitur in suits between master and servant.

> "The phrase picked out for criticism did not controvert that proposition but merely expressed in an untechnical way that if the death was due to a defective instrumentality and no explanation was given, the plaintiff had sustained the burden. The instruction is criticized further as if the judge had said *res ipsa loquitur*—which would have been right or wrong according to the res referred to. The judge did not say that the fall of the engine was enough, but that proof of a defect in appliances which the Company was bound to use care to keep in order and which usually would

be in order if due care was taken, was *prima facie* evidence of neglect." (Page 86.)

WHICH WOULD HAVE BEEN RIGHT OR WRONG ACCORDING TO THE RES REFERRED TO in the above quotation determines that the rule is *properly applied when the res referred to is the defective instrumentality* and improperly when the res referred to is the happening of the accident alone.

The justice of and reasons for the application of this rule in proper cases is well illustrated in the opinion of the Minnesota Supreme Court which contains Wigmore's statement thereof (F. 143-150, Record). Its application "does not relieve plaintiff of the burden of proof, but does put the burden of explanation upon the defendant."

> "In our opinion, *res ipsa loquitur* means that the facts of the occurrence warrant the inference of negligence, not that they compel such an inference; that they furnish circumstantial evidence of negligence where direct evidence of it may be lacking, but it is evidence to be weighed, not necessarily to be accepted as sufficient; that they call for explanation or rebuttal, not necessarily that they require it; that they make a case to be decided by the jury, not that they forstall the verdict. *Res ipsa loquitur*, where it applies, does not convert the defendant's general issue into an affirmative defense. When all the evidence is in, the question for the jury is whether the preponderance is with the plaintiff."
>
> Sweeney v. Erving, 228 U. S. 233, 33 Sup. Ct. Rep. 416, 418.

The operation of the rule relieves the injured party from the duty of going on and showing that

one charged with the negligence had knowledge of the defect at or before the time of the injury, or that, if diligent, he ought to have had such knowledge. When, as in the case at bar, the facts are peculiarly within the knowledge of the one charged with negligence, such a one is charged with the duty of explaining or showing facts excusing its failure to remedy the said defects. Otherwise the conclusion of negligence "might be reasonably drawn by the jury."

From whatever angle the questions presented here are viewed the same conclusion is inevitably arrived at, viz., that plaintiff in error is asking this court:

> "* * * to scrutinize the whole record for the purpose of discovering whether it may not be possible, by a minute analysis of the evidence, to draw therefrom inferences which may possibly conflict with the conclusion of the courts below as to the tendencies of proof, * * *"

which this court, in the case of Chicago Etc. Ry. Co. v. King, 222 U. S. 222, supra, stated it did not feel called upon to do in view of the full opinion of the lower court. The full opinion of the lower court in this case presents the whole case and all the questions at issue here.

It is therefore respectfully submitted that the judgment appealed from should be affirmed.

W. R. DUXBURY,
Attorney for Defendant in Error,
St. Paul, Minn.

LYLE PETTIJOHN,
Of Counsel.

GREAT NORTHERN RAILWAY COMPANY *v.* WILES, ADMINISTRATOR.

ERROR TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

No. 196. Submitted January 26, 1916.—Decided March 20, 1916.

Where there is nothing to extenuate the negligence of the employé, or to confuse his judgment, and his duty is as clear as its performance is easy, and he knows not only the imminent danger of the situation, but also how it can be averted by complying with the rules of the employer, there is no justification for a comparison of negligences on the part of the employer and employé or the apportioning of their effect under the provision of the Employers' Liability Act. To excuse such neglect on the part of an employé of an interstate carrier would not only cast immeasurable liability on the carriers but remove security from those carried.

In such cases it is disputable whether the doctrine of *res ipsa loquitur* applies at all; and, in this case, *held* that the submission to the jury of whether negligence of the carriers existed as a deduction from the fact that a draw-bar pulled out from causes not shown by the testimony, and the proportion of the carrier's negligence in causing the death of an employé was, in view of the failure of the employé to perform his duty and comply with the rules of the employer under such circumstances, reversible error.

125 Minnesota, 348, reversed.

THE facts, which involve the construction and application of the Federal Employers' Liability Act and the valid-

ity of a judgment in an action thereunder, are stated in the opinion.

Mr. E. C. Lindley and *Mr. M. L. Countryman* for plaintiff in error.

Mr. W. R. Duxbury and *Mr. Lyle Pettijohn* for defendant in error.

Mr. Justice McKenna delivered the opinion of the court.

Action for damages for the killing of one Dennis E. Wiles, brought by the administrator of his estate, who is also his father and next of kin. It was brought under the Employers' Liability Act of April 22, 1908 (35 Stat. 65, c. 149), as amended April 5, 1910 (36 Stat. 291, c. 143).

Wiles was a freight brakeman in the employ of the railway company in interstate commerce, the company being an interstate common carrier.

There was a verdict for plaintiff in the sum of $650. Upon motion of defendant the court, expressing the view that Wiles' negligence was the proximate cause of the accident which resulted in his death, rendered judgment that, notwithstanding the verdict, plaintiff take nothing by his action, that the same be dismissed, and that the railway company recover of plaintiff $36.52 costs.

The judgment was reversed by the Supreme Court of the State and judgment ordered to be entered on the verdict.

The only issue is as to the negligence of the railway company and the contributory negligence of the deceased and the causal relation, if either existed, to the death of the deceased.

The determining facts of the case are as follows:

Deceased was a rear brakeman on a freight train of the railway company proceeding easterly between Grotto and

Skykomish, Washington. After having passed a curve in the road the train broke in two by the drawbar pulling out of the sixth car from the engine, which caused the train to stop instantly. It was run into shortly after (from 3 to 5 minutes, it was testified) by a passenger train drawn by two engines. The night was pretty dark and the weather a little misty. At the place of collision the track was obstructed by a very sharp curve and a bluff on the right hand side for about five box car lengths, and the rear end of the freight train at that place could not be seen more than five box car lengths away. On the left hand side of the engine, which is the fireman's side, the track could not be seen more than a car length ahead because that would be on the outside of the curve. The engineer of the passenger train did not know of the existence of the freight train ahead and no negligence is attributed to him. The deceased and the conductor of the freight train were in the caboose and both were killed. What caused the pulling out of the drawbar was not shown, nor was there proof that it was defective or that the company was negligent in the care or use of it.

The head brakeman of the freight train testified that the train stopped immediately upon the pulling out of the drawbar, that he descended from the train and hastened back to the caboose for a chain and that he saw the headlight of the passenger train as it came around the curve. He further testified that it was Wiles' duty to have gone back to protect the rear end of his train at the time the passenger train was due out of the station in the rear, and that this applied whether the delayed inferior train which was ahead was running or standing still; that it was the duty of Wiles to have gone back a sufficient distance to guarantee full protection to the rear of his train, and that the engineer of the freight train, at the time the train broke in two, signaled the rear brakeman to go back and protect the rear end of his train. The same testimony as

to the duty of Wiles was given by another witness. It appeared also from the testimony that the freight train was losing time by slipping and that Wiles knew the time that the passenger train was due to leave Grotto station and he should have dropped off or dropped fusees on the track to notify the engineer of the passenger train that the freight was running slow. The fusees are of red and yellow lights; the red means to stop for ten minutes, the yellow means to bring the train under control and keep it under control until the next station is reached.

The rules of the railway company were put in evidence as follows:

"Rule 99. When a train stops or is delayed by any circumstance under which it may be overtaken by another train, the flagman must go back immediately with stop signals a sufficient distance to insure full protection. When recalled he may return to his train, first placing two torpedoes on the rail six rail lengths apart, or a lighted fusee in the center of the track when conditions require."

"Rule 100. If the train should part while in motion trainmen must, if possible. prevent damage to the detached portions. The signals prescribed by 13D and 15F must be given."

13D is the lantern signal or hand signal, either one; 15F is the whistle signal. Rule 100 applied to what should be done by the members of the train crew for the protection of the separated portions of the train itself. Rule 99 applied to what should be done for the protection of other trains approaching.

The Supreme Court applied the rule of *res ipsa loquitur* and justified a submission to the jury of the negligence of the railway company as a deduction from the pulling out of the drawbar and the proportion of its causal relation to the death of Wiles to the amount of negligence attributable to him, and reversed the action of the trial court entering judgment for the company notwithstanding the verdict.

The application of the doctrine to cases like that at bar is disputable. *Patton* v. *Texas & Pacific Ry. Co.*, 179 U. S. 658; *Looney* v. *Metropolitan R. R. Co.*, 200 U. S. 480, 486. We, however, do not have to go farther than to indicate the dispute. The case at bar is not solved by the doctrine. There is no justification for a comparison of negligences or the apportioning of their effect. The pulling out of the drawbar produced a condition which demanded an instant performance of duty by Wiles, a duty not only to himself but to others. The rules of the company were devised for such condition and provided for its emergency. Wiles knew them and he was prompted to the performance of the duty they enjoined (the circumstances would seem to have needed no prompting) by signals from the engineer when the train stopped. He disregarded both. His fate gives pause to blame, but we cannot help pointing out that the tragedy of the collision might have been appalling. He brought death to himself and to the conductor of his train. His neglect might have extended the catastrophe to the destruction of passengers in the colliding train. How imperative his duty was is manifest. To excuse its neglect in any way would cast immeasurable liability upon the railroads and, what is of greater concern, remove security from the lives of those who travel upon them; and therefore all who are concerned with their operation, however high or low in function, should have a full and an anxious sense of responsibility.

In the present case there was nothing to extenuate Wiles' negligence; there was nothing to confuse his judgment or cause hesitation. His duty was as clear as its performance was easy. He knew the danger of the situation and that it was imminent; to avert it he had only to descend from his train, run back a short distance, and give the signals that the rules directed.

Judgment reversed and cause remanded for further proceedings not inconsistent with this opinion.